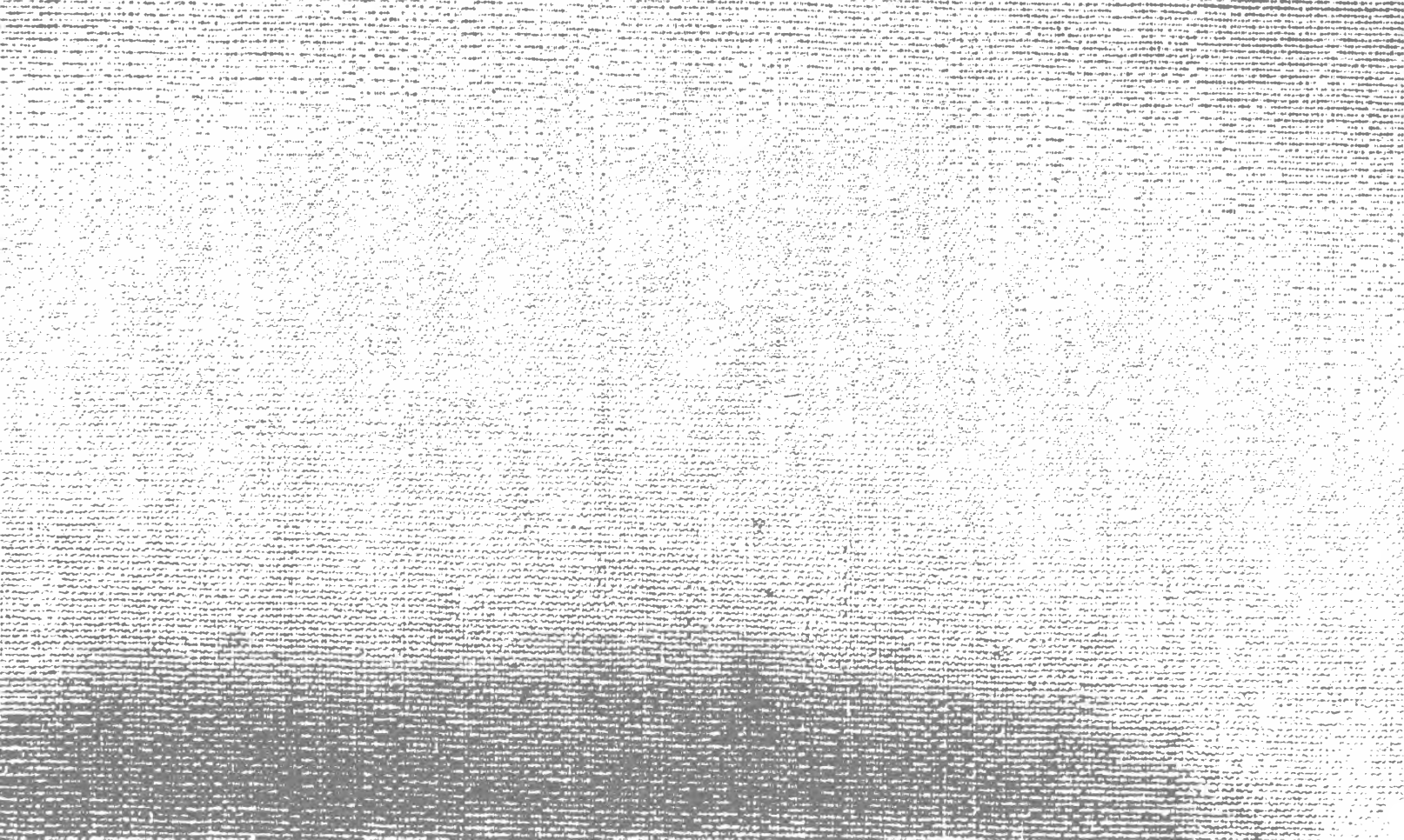

San Francisco

Law Library

436 CITY HALL

EXTRACT FROM RULES

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No. 16199 Vol. 3098

United States Court of Appeals

For the Ninth Circuit

See Also 3097

JAMES BURTON ING and RAYMOND WRIGHT,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

In Two Volumes

Volume I

(Pages 1 to 276)

Appeals from the District Court for the District of Alaska, Third Division

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—8-21-59

No. 16199

United States Court of Appeals

For the Ninth Circuit

JAMES BURTON ING and RAYMOND WRIGHT,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX PAGE

ATTORNEYS OF RECORD

WENDELL P. KAY,
P.O. Box 1178,
Anchorage, Alaska,

For Appellants.

WILLIAM T. PLUMMER,
U. S. Attorney;

GEORGE N. HAYES,
Asst. U. S. Attorney,
Federal Bldg.,
Anchorage, Alaska,

For Appellee.

In the District Court for the District of Alaska,
Third Division

Criminal No. 3772

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES BURTON ING, RAYMOND WRIGHT, CHARLES E. SMITH, JOHN WALKER, DEWEY TAYLOR and LEMUEL ASHLY WILLIAMS,

Defendants.

INDICTMENT

(Violation of Section 65-6-1, ACLA, 1949)

The Grand Jury charges:

Count I.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware did wilfully, unlawfully and feloniously with intent to injure and defraud C. A. Peters, owner of the Fifth Avenue Cash Grocery, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc.
General Contractors
Boise, Idaho

Pay Check No. 9078.

This check not good for more than sixty days.
Contract 1787—August 22, 1956.

Period Ended 8/19/56.
Pay to the Order of Wendell R. Ware.
Badge No. 1177.
Gross Earnings 236.00.

Deductions

WT & FICA 26.20 A.U.C. 1.18 Alaska I.T. 3.15
B. and L. 28.00

Amount of Check 177.47.

The sum of $177 and 47 cts.

THE FIRST NATIONAL BANK
OF ANCHORAGE
59-6 Anchorage, Alaska.

MORRISON-KNUDSEN
COMPANY, INC.

By /s/ GUY M. KING.

[Reverse side of check with endorsement and bank stamps are not reproduced because they are partially illegible.]

The said James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware well knowing at the time that the check was false and forged.

Count II.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware did wilfully, unlawfully, and feloniously with intent to injure and defraud the Kennedy Hardware, Incorporated, a corporation duly organized and incorporated in the Territory of Alaska, the owners of a certain business enterprise, the Sport Shop, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc.
General Contractors
Boise, Idaho

Pay Check No. 8941.

This check not good for more than sixty days.
Contract 1787—August 22, 1956.

Period Ended 8/19/56.
Pay to the Order of Wendell R. Ware.
Badge No. 1177.
Gross Earnings 236.00.

Deductions

WT & FICA 26.20 A.U.C. 1.18 Alaska I.T. 3.15
B. and L. 28.00

Amount of Check 177.47.

The sum of $177 and 47 cts.

THE FIRST NATIONAL BANK
OF ANCHORAGE
59-6 Anchorage, Alaska.

MORRISON-KNUDSEN
COMPANY, INC.

By /s/ GUY M. KING.

[Reverse side of check with endorsement and bank stamps are not reproduced because they are partially illegible.]

The said James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware well knowing at the time that the check was false and forged.

Count III.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware did wilfully, unlawfully and feloniously with intent to injure and defraud the Hub Clothing Company, Incorporated, a corporation duly organized and incorporated in the Territory of Alaska, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc.
General Contractors
Boise, Idaho

Pay Check No. 8833.

This check not good for more than sixty days.
Contract 1787—August 22, 1956.

Period Ended 8/19/56.

Pay to the Order of Wendell R. Ware.

Badge No. 1177.

Gross Earnings 236.00.

Deductions

WT & FICA 26.20 A.U.C. 1.18 Alaska I.T. 3.15
B. and L. 28.00

Amount of Check 177.47.

The sum of $177 and 47 cts.

THE FIRST NATIONAL BANK
OF ANCHORAGE
59-6 Anchorage, Alaska.

MORRISON-KNUDSEN
COMPANY, INC.

By /s/ GUY M. KING.

[Reverse side of check with endorsement and bank stamps are not reproduced because they are partially illegible.]

The said James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware well knowing at the time that the check was false and forged.

Count IV.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware did wilfully, unlawfully and feloniously with intent to injure and defraud the Union Club of Anchorage, Incorporated, a corporation duly organized and incorporated in the Territory of Alaska, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc.
General Contractors
Boise, Idaho

Pay Check No. 8895.

This check not good for more than sixty days.
Contract 1787—August 22, 1956.

Period Ended 8/19/56.
Pay to the Order of Wendell R. Ware.
Badge No. 1177.
Gross Earnings 236.00.

Deductions

WT & FICA 26.20 A.U.C. 1.18 Alaska I.T. 3.15
B. and L. 28.00

Amount of Check 177.47.

The sum of $177 and 47 cts.

THE FIRST NATIONAL BANK
OF ANCHORAGE

59-6 Anchorage, Alaska.

MORRISON-KNUDSEN
COMPANY, INC.

By /s/ GUY M. KING.

[Reverse side of check with endorsement and bank stamps are not reproduced because they are partially illegible.]

The said James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware well knowing at the time that the check was false and forged.

Count V.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware did wilfully, unlawfully and feloniously with intent to injure and defraud Wallace Burnett and Helen Burnett, owners of The Club, a partnership duly organized in the Territory of Alaska, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc.
General Contractors
Boise, Idaho

Pay Check No. 8965.

This check not good for more than sixty days.
Contract 1787—August 29, 1956.

Period Ended 8/26/56.
Pay to the Order of Wendell R. Ware.
Badge No. 1177.
Gross Earnings 280.00.

Deductions

WT & FICA 39.79 A.U.C. 1.40 Alaska I.T. 3.55
B. and L. 28.00

Amount of Check 207.26.

The Sum of $207 and 26 cts.

THE FIRST NATIONAL BANK
OF ANCHORAGE
59-6 Anchorage, Alaska.

MORRISON-KNUDSEN
COMPANY, INC.

By /s/ GUY M. KING.

[Reverse side of check with endorsement and bank stamps are not reproduced because they are partially illegible.]

The said James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware well knowing at the time that the check was false and forged.

Count VI.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown did wilfully, unlawfully and feloniously with intent to injure and defraud Dukal Enterprises, Incorporated, a corporation duly organized and incorporated in the Territory of Alaska, the owners of a certain business enterprise, the Hanover Gift Shop, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc.
General Contractors
Boise, Idaho

Pay Check No. 9089.

This check not good for more than sixty days.
Contract 1787—August 22, 1956.

Period Ended 8/19/56.
Pay to the Order of Thomas A. Brown.
Badge No. 7134.
Gross Earnings 280.00.

Deductions

WT & FICA 30.70 A.U.C. 1.40 Alaska I.T. 3.55
B. and L. 28.00

Amount of Check 216.35.

The Sum of $216 and 35 cts.

THE FIRST NATIONAL BANK
OF ANCHORAGE

59-6 Anchorage, Alaska.

MORRISON-KNUDSEN
COMPANY, INC.

By /s/ GUY M. KING.

[Reverse side of check with endorsement and bank stamps are not reproduced because they are partially illegible.]

The said James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown well knowing at the time that the check was false and forged.

Count VII.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown did wilfully, unlawfully and feloniously with intent to injure and defraud John D. Harris, owner of the Anchorage Liquor Store, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc.
General Contractors
Boise, Idaho

Pay Check No. 9055.

This check not good for more than sixty days.
Contract 1787—August 29, 1956.

Period Ended 8/26/56.
Pay to the Order of Thomas A. Brown.
Badge No. 7134.
Gross Earnings 280.00.

Deductions

WT & FICA 30.70 A.U.C. 1.40 Alaska I.T. 3.55
B. and L. 28.00

Amount of Check 216.35.

The Sum of $216 and 35 cts.

THE FIRST NATIONAL BANK
OF ANCHORAGE
59-6 Anchorage, Alaska.

MORRISON-KNUDSEN
COMPANY, INC.

By /s/ GUY M. KING.

[Reverse side of check with endorsement and bank stamps are not reproduced because they are partially illegible.]

The said James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown well knowing at the time that the check was false and forged.

Count VIII.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown did wilfully, unlawfully and feloniously with intent to injure and defraud Wilma Jones and Cecil Jones, the owners of Hank's Hardware, a partnership duly organized in the Territory of Alaska, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc.
General Contractors
Boise, Idaho

Pay Check No. 9008.

This check not good for more than sixty days.
Contract 1787—August 22, 1956.

Period Ended 8/19/56.
Pay to the Order of Thomas A. Brown.
Badge No. 7134.
Gross Earnings 280.00.

Deductions

WT & FICA 30.70 A.U.C. 1.40 Alaska I.T. 3.55
B. and L. 28.00

Amount of Check 216.35.

The Sum of $216 and 35 cts.

THE FIRST NATIONAL BANK
OF ANCHORAGE

59-6 Anchorage, Alaska.

MORRISON-KNUDSEN
COMPANY, INC.

By /s/ GUY M. KING.

[Reverse side of check with endorsement and bank stamps are not reproduced because they are partially illegible.]

The said James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown well knowing at the time that the check was false and forged.

Count IX.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown did wilfully, unlawfully and feloniously with intent to injure and defraud C. T. Rewak, owner of Tom's Radio Service, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc.
General Contractors
Boise, Idaho

Pay Check No. 9073.

This check not good for more than sixty days.
Contract 1787—August 22, 1956.

Period Ended 8/19/56.
Pay to the Order of Thomas A. Brown.
Badge No. 7134.
Gross Earnings 280.00.

Deductions

WT & FICA 30.70 A.U.C. 1.40 Alaska I.T. 3.55
B. and L. 28.00

Amount of Check 216.35.

The Sum of $216 and 35 cts.

THE FIRST NATIONAL BANK
OF ANCHORAGE
59-6 Anchorage, Alaska.

MORRISON-KNUDSEN
COMPANY, INC.

By /s/ GUY M. KING.

[Reverse side of check with endorsement and bank stamps are not reproduced because they are partially illegible.]

The said James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown well knowing at the time that the check was false and forged.

Count X.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown did wilfully, unlawfully and feloniously with intent to injure and defraud Robert W. Stratton, Jr., owner of Stratton's Gateway Service, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc.
General Contractors
Boise, Idaho

Pay Check No. 9015.

This check not good for more than sixty days.
Contract 1787—August 29, 1956.

Period Ended 8/26/56.
Pay to the Order of Thomas A. Brown.
Badge No. 7134.
Gross Earnings 280.00.

Deductions

WT & FICA 30.70 A.U.C. 1.40 Alaska I.T. 3.55
B. and L. 28.00

Amount of Check 216.35.

The Sum of $216 and 35 cts.

THE FIRST NATIONAL BANK
OF ANCHORAGE
59-6 Anchorage, Alaska.

MORRISON-KNUDSEN
COMPANY, INC.

By /s/ GUY M. KING.

[Reverse side of check with endorsement and bank stamps are not reproduced because they are partially illegible.]

The said James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown well knowing at the time that the check was false and forged.

Count XI.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown did wilfully, unlawfully and feloniously with intent to injure and defraud Roy McKay, owner of McKay's Hardware, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc.
General Contractors
Boise, Idaho

Pay Check No. 9057.

This check not good for more than sixty days.
Contract 1787—August 29, 1956.

Period Ended 8/26/56.
Pay to the Order of Thomas A. Brown.
Badge No. 7134.
Gross Earnings 280.00.

Deductions

WT & FICA 30.70 A.U.C. 1.40 Alaska I.T. 3.55
B. and L. 28.00

Amount of Check 216.35.

The Sum of $216 and 35 cts.

THE FIRST NATIONAL BANK
OF ANCHORAGE
59-6 Anchorage, Alaska.

MORRISON-KNUDSEN
COMPANY, INC.

By /s/ GUY M. KING.

[Reverse side of check with endorsement and bank stamps are not reproduced because they are partially illegible.]

The said James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown well knowing at the time that the check was false and forged.

Count XII.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District

of Alaska, James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods did wilfully, unlawfully and feloniously with intent to injure and defraud Thomas B. Waters, owner of the Frontier Loan Company, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc.
General Contractors
Boise, Idaho

Pay Check No. 8903.

This check not good for more than sixty days.
Contract 1787—August 29, 1956.

Period Ended 8/26/56.
Pay to the Order of James C. Woods.
Badge No. 6840.
Gross Earnings 280.00.

Deductions

WT & FICA 27.60 A.U.C. 1.40 Alaska I.T. 3.54
B. and L. 28.00

Amount of Check 219.46.

The Sum of $219 and 46 cts.

THE FIRST NATIONAL BANK
OF ANCHORAGE
59-6 Anchorage, Alaska.

MORRISON-KNUDSEN
COMPANY, INC.

By /s/ GUY M. KING.

[Reverse side of check with endorsement and bank stamps are not reproduced because they are partially illegible.]

The said James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods well knowing at the time that the check was false and forged.

Count XIII.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods did wilfully, unlawfully and feloniously with intent to injure and defraud Sonja Davis and Walter Davis, owners of the Davis Liquor Store, a partnership duly organized in the Territory of Alaska, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc.
General Contractors
Boise, Idaho

Pay Check No. 9012.

This check not good for more than sixty days.
Contract 1787—August 21, 1956.

Period Ended 8/19/56.
Pay to the Order of James C. Woods.
Badge No. 6840.
Gross Earnings 280.00.

Deductions

WT & FICA 27.60 A.U.C. 1.40 Alaska I.T. 3.54

B. and L. 28.00

Amount of Check 219.46.

The Sum of $219 and 46 cts.

THE FIRST NATIONAL BANK
OF ANCHORAGE

59-6 Anchorage, Alaska.

MORRISON-KNUDSEN
COMPANY, INC.

By /s/ GUY M. KING.

[Reverse side of check with endorsement and bank stamps are not reproduced because they are partially illegible.]

The said James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods well knowing at the time that the check was false and forged.

Count XIV.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods did wilfully, unlawfully and feloniously with intent to injure and defraud Robert J. Shimek and Violet D. Shimek, owners of the Record Shop, The Radio-TV Center, a partnership duly organized in the Territory of Alaska, utter and publish as true and genu-

ine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc.
General Contractors
Boise, Idaho

Pay Check No. 8973.

This check not good for more than sixty days.
Contract 1787—August 29, 1956.

Period Ended 8/26/56.
Pay to the Order of James C. Woods.
Badge No. 6840.
Gross Earnings 280.00.

Deductions

WT & FICA 27.60 A.U.C. 1.40 Alaska I.T. 3.54
B. and L. 28.00

Amount of Check 219.46.

The Sum of $219 and 46 cts.

THE FIRST NATIONAL BANK
OF ANCHORAGE
59-6 Anchorage, Alaska.

MORRISON-KNUDSEN
COMPANY, INC.

By /s/ GUY M. KING.

[Reverse side of check with endorsement and bank stamps are not reproduced because they are partially illegible.]

The said James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods well knowing at the time that the check was false and forged.

Count XV.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods did wilfully, unlawfully and feloniously with intent to injure and defraud George J. Cox and James LaBounty, owners of the City Service, a partnership duly organized in the Territory of Alaska, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc.
General Contractors
Boise, Idaho

Pay Check No. 8977.

This check not good for more than sixty days.
Contract 1787—August 15, 1956.

Period Ended 8/12/56.
Pay to the Order of James C. Woods.
Badge No. 6840.
Gross Earnings 280.00.

Deductions

WT & FICA 27.60 A.U.C. 1.40 Alaska I.T. 3.54
B. and L. 28.00

Amount of Check 219.46.

The Sum of $219 and 46 cts.

THE FIRST NATIONAL BANK
OF ANCHORAGE

59-6 Anchorage, Alaska.

MORRISON-KNUDSEN
COMPANY, INC.

By /s/ GUY M. KING.

[Reverse side of check with endorsement and bank stamps are not reproduced because they are partially illegible.]

The said James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods well knowing at the time that the check was false and forged.

Count XVI.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods did wilfully, unlawfully and feloniously with intent to injure and defraud Benny Leonard and Mary Leonard, owners of Leonard's Varieties, a partnership duly organized in the Territory of Alaska, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc.
General Contractors
Boise, Idaho

Pay Check No. 9065.

This check not good for more than sixty days.
Contract 1787—August 29, 1956.

Period Ended 8/26/56.
Pay to the Order of James C. Woods.
Badge No. 6840.
Gross Earnings 280.00.

Deductions

WT & FICA 27.60 A.U.C. 1.40 Alaska I.T. 3.54
B. and L. 28.00

Amount of Check 219.46.

The Sum of $219 and 46 cts.

THE FIRST NATIONAL BANK
OF ANCHORAGE
59-6 Anchorage, Alaska.

MORRISON-KNUDSEN
COMPANY, INC.

By /s/ GUY M. KING.

[Reverse side of check with endorsement and bank stamps are not reproduced because they are partially illegible.]

The said James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods well knowing at the time that the check was false and forged.

Count XVII.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods did wilfully, unlawfully and feloniously with intent to injure and defraud H. I. Stewart and Oro Stewart, owners of the Stewart's Photo Shop, a partnership duly organized in the Territory of Alaska, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc.
General Contractors
Boise, Idaho

Pay Check No. 9051.

This check not good for more than sixty days.
Contract 1787—August 29, 1956.

Period Ended 8/26/56.
Pay to the Order of James C. Woods.
Badge No. 6840.
Gross Earnings 280.00.

Deductions

WT & FICA 27.60 A.U.C. 1.40 Alaska I.T. 3.54
B. and L. 28.00

Amount of Check 219.46.

The Sum of $219 and 46 cts.

THE FIRST NATIONAL BANK
OF ANCHORAGE

59-6 Anchorage, Alaska.

MORRISON-KNUDSEN
COMPANY, INC.

By /s/ GUY M. KING.

[Reverse side of check with endorsement and bank stamps are not reproduced because they are partially illegible.]

The said James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods well knowing at the time that the check was false and forged.

Count XVIII.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods did wilfully, unlawfully and feloniously with intent to injure and defraud John D. Harris, owner of the Anchorage Liquor Store, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc.
General Contractors
Boise, Idaho

Pay Check No. 9056.

This check not good for more than sixty days.
Contract 1787—August 29, 1956.

Period Ended 8/26/56.
Pay to the Order of James C. Woods.
Badge No. 6840.
Gross Earnings 280.00.

Deductions

WT & FICA 27.60 A.U.C. 1.40 Alaska I.T. 3.54
B. and L. 28.00

Amount of Check 219.46.

The Sum of $219 and 46 cts.

THE FIRST NATIONAL BANK
OF ANCHORAGE
59-6 Anchorage, Alaska.

MORRISON-KNUDSEN
COMPANY, INC.

By /s/ GUY M. KING.

[Reverse side of check with endorsement and bank stamps are not reproduced because they are partially illegible.]

The said James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods well knowing at the time that the check was false and forged.

Count XIX.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Lemuel Ashly Williams aka Theodore Williams did wilfully, unlawfuly and feloniously with intent to injure and defraud John D. Harris, owner of the Anchorage Liquor Store, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc.
General Contractors
Boise, Idaho

Pay Check No. 8927.

This check not good for more than sixty days.
Contract 1787—August 29, 1956.

Period Ended 8/26/56.
Pay to the Order of Theodore Williams.
Badge No. 6969.
Gross Earnings 270.00.

Deductions

WT & FICA 19.50 A.U.C. 1.35 Alaska I.T. 3.38
B. and L. 28.00

Amount of Check 217.87.

The Sum of $217 and 87 cts.

THE FIRST NATIONAL BANK
OF ANCHORAGE

59-6 Anchorage, Alaska.

MORRISON-KNUDSEN
COMPANY, INC.

By /s/ GUY M. KING.

[Reverse side of check with endorsement and bank stamps are not reproduced because they are partially illegible.]

The said James Burton Ing, Raymond Wright and Lemuel Ashly Williams aka Theodore Williams well knowing at the time that the check was false and forged.

Count XX.

On or about the 1st day of September, 1956, at or near Mile 113, Glenn Highway, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Lemuel Ashly Williams aka Theodore Williams did wilfully, unlawfully and feloniously with intent to injure and defraud Gertrude Jurgeleit and Oscar Jurgeleit, owners of the Sheep Mountain Lodge, a partnership duly organized in the Territory of Alaska, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc.
General Contractors
Boise, Idaho

Pay Check No. 8924.

This check not good for more than sixty days.
Contract 1787—August 29, 1956.

Period Ended 8/26/56.
Pay to the Order of Theodore Williams.
Badge No. 6969.
Gross Earnings 270.00.

Deductions
WT & FICA 19.50 A.U.C. 1.35 Alaska I.T. 3.38
B. and L. 28.00

Amount of Check 217.87.

The Sum of $217 and 87 cts.

THE FIRST NATIONAL BANK
OF ANCHORAGE
59-6 Anchorage, Alaska.

MORRISON-KNUDSEN
COMPANY, INC.
By /s/ GUY M. KING.

[Reverse side of check with endorsement and bank stamps are not reproduced because they are partially illegible.]

The said James Burton Ing, Raymond Wright and Lemuel Ashly Williams aka Theodore Williams well knowing at the time that the check was false and forged.

A True Bill.

/s/ HAROLD STRANDBERG,
Foreman.

/s/ WILLIAM T. PLUMMER,
United States Attorney.

Witnesses examined before the Grand Jury: T. E. Pass, Dewey Taylor, Charles E. Smith, John Walker, Lemuel Williams, Raymond Wright, Virginia Shields, Carl R. Berlin, Henry Futor, Ivan S. Barton, Helen M. Burnett, Charles H. Knuth, John D. Harris, Mabel Rewak, George C. Wilmoth, Roy McKay, Thomas B. Waters, Darleen Rasmussen, Benny L. Leonard, William J. Gordon, Jim LaBounty, Joseph Turgeon, Gertrude Jurgeleit, Roy B. Johnson, Jr., Russell Hobbs, Gladys Faye Berry.

Presented to the Court by the Foreman of the Grand Jury in open Court, in the presence of the Grand Jury and Filed in the District Court, Territory of Alaska, Third Division.

WM. A. HILTON,
Clerk.

By /s/ AGNES CURTIS,
Deputy.

Bail fixed in the amount of: Ing, $25,000; Williams, $10,000; Taylor, $750; Walker, $750; Wright, $12,500; Smith, $2,500.

/s/ J. L. McCARREY, JR.,
District Judge.

October 29, 1957.

[Title of District Court and Cause.]

VERDICT No. 1

We, the jury, duly impaneled and sworn to try the above-entitled case, do find the defendant, James Burton Ing, guilty of the crime charged in Count I of the indictment;

And we do further find the defendant guilty of the crime charged in Count II of the indictment;

And we do further find the defendant guilty of the crime charged in Count III of the indictment;

And we do further find the defendant guilty of the crime charged in Count IV of the indictment;

And we do further find the defendant guilty of the crime charged in Count V of the indictment;

And we do further find the defendant guilty of the crime charged in Count VI of the indictment;

And we do further find the defendant guilty of the crime charged in Count VII of the indictment;

And we do further find the defendant guilty of the crime charged in Count VIII of the indictment;

And we do further find the defendant guilty of the crime charged in Count IX of the indictment;

And we do further find the defendant guilty of the crime charged in Count X of the indictment;

And we do further find the defendant guilty of the crime charged in Count XI of the indictment;

And we do further find the defendant guilty of the crime charged in Count XII of the indictment;

And we do further find the defendant guilty of the crime charged in Count XIII of the indictment;

And we do further find the defendant guilty of the crime charged in Count XIV of the indictment;

And we do further find the defendant guilty of the crime charged in Count XV of the indictment;

And we do further find the defendant guilty of the crime charged in Count XVI of the indictment;

And we do further find the defendant guilty of the crime charged in Count XVII of the indictment;

And we do further find the defendant guilty of the crime charged in Count XVIII of the indictment;

And we do further find the defendant guilty of the crime charged in Count XIX of the indictment;

And we do further find the defendant guilty of the crime charged in Count XX of the indictment.

Dated at Anchorage, Alaska, this 28th day of Feb., 1958.

/s/ HADLEY H. SULLIVAN,
Foreman.

[Endorsed]: Filed and entered February 28, 1958.

[Title of District Court and Cause.]

VERDICT No. 2

We, the jury, duly impaneled and sworn to try the above-entitled case, do find the defendant Raymond Wright, not guilty of the crime charged in Count I of the indictment;

And we do further find the defendant not guilty of the crime charged in Count II of the indictment;

And we do further find the defendant not guilty of the crime charged in Count III of the indictment;

And we do further find the defendant not guilty of the crime charged in Count IV of the indictment;

And we do further find the defendant not guilty of the crime charge in Count V of the indictment;

And we do further find the defendant guilty of the crime charged in Count VI of the indictment;

And we do further find the defendant guilty of the crime charged in Count VII of the indictment;

And we do further find the defendant guilty of the crime charged in Count VIII of the indictment;

And we do further find the defendant guilty of the crime charged in Count IX of the indictment;

And we do further find the defendant guilty of the crime charged in Count X of the indictment;

And we do further find the defendant guilty of the crime charged in Count XI of the indictment;

And we do further find the defendant guilty of the crime charged in Count XII of the indictment;

And we do further find the defendant guilty of the crime charged in Count XIII of the indictment;

And we do further find the defendant guilty of the crime charged in Count XIV of the indictment;

And we do further find the defendant guilty of the crime charged in Count XV of the indictment;

And we do further find the defendant guilty of the crime charged in Count XVI of the indictment;

And we do further find the defendant guilty of the crime charged in Count XVII of the indictment;

And we do further find the defendant guilty of the crime charged in Count XVIII of the indictment;

And we do further find the defendant not guilty of the crime charged in Count XIX of the indictment;

And we do further find the defendant not guilty of the crime charged in Count XX of the indictment.

Dated at Anchorage, Alaska, this 28th day of February, 1958.

/s/ HADLEY H. SULLIVAN,
Foreman.

[Endorsed]: Filed and entered February 28, 1958.

United States District Court for the District of Alaska, Third Division

No. Cr. 3772

UNITED STATES OF AMERICA,

vs.

JAMES BURTON ING.

JUDGMENT AND COMMITMENT

On this 5th day of March, 1958, came the attorney for the government and the defendant appeared in person and by counsel.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a finding of guilty of the offense of uttering and publishing a forged check in violation of Section 65-6-1 ACLA

1949, as charged in Counts I thru XX of the indictment on file herein; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Fifteen (15) years on each of Counts I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, said sentence imposed on Counts II thru XX to run concurrently with said sentence imposed on Count I, said sentence to commence and begin on the 5th day of March, 1958.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Done in open Court this 5th day of March, 1958, at Anchorage, Alaska.

/s/ J. L. McCARREY, JR.,
United States District Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed and entered March 5, 1958.

United States District Court for the District of Alaska, Third Division

No. Cr. 3772

UNITED STATES OF AMERICA,

vs.

RAYMOND WRIGHT.

JUDGMENT AND COMMITMENT

On this 5th day of March, 1958, came the attorney for the government and the defendant appeared in person and by counsel.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a finding of guilty of the offense of uttering and publishing a forged check in violation of Section 65-6-1 ACLA 1949, as charged in Counts VI thru XVIII of the Indictment on file herein; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It It Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Twelve (12) years on each of Counts VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, said sentence imposed on

Counts VII thru XVIII to run concurrently with said sentence imposed on Count VI, said sentence to commence and begin on the 5th day of March, 1958.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Done in open Court this 5th day of March, 1958, at Anchorage, Alaska.

/s/ J. L. McCARREY, JR.,
United States District Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed and entered March 5, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and Address of Appellant: James Burton Ing, Box 1178, Anchorage, Alaska.

Names and Addresses of Appellant's Attorneys: Wendell P. Kay, Esq., 604 Fourth Avenue, Anchorage, Alaska; T. N. Gore, Jr., Fairbanks, Alaska.

Offense: Forgery.

Concise Statement of Judgment or Order, giving date, and any sentence:

Judgment entered as of March 5, 1958, finding the appellant guilty of the offense of uttering and publishing a forged check in violation of Section 65-6-1, ACLA 1949, as charged in Counts I through XX of the indictment, and sentencing him to serve fifteen years on each of said twenty counts, said sentences to run concurrently, in such penal institution as the Attorney General or his authorized representative may direct. Appellant is presently on bail pending decision on motion for judgment of acquittal.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above judgment.

Dated at Anchorage, Alaska, March 14, 1958.

/s/ S. J. BUCKALEW, JR., for

/s/ WENDELL P. KAY,
Of Attorneys for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 14, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and Address of Appellant: Raymond Wright, Fairbanks, Alaska.

Name and address of Appellant's Attorney: Everett Hepp, Esq., Box 1022, Fairbanks, Alaska.

Offense: Forgery.

Concise Statement of Judgment or Order, giving date and any sentence:

Judgment entered as of March 5, 1958, finding the Appellant guilty of the offense of uttering and publishing a forged check, in violation of Section 65-6-1, ACLA 1949, as charged in Counts VI through XVIII of the indictment, and sentencing him to serve twelve (12) years on each of said counts, said sentences to run concurrently, in such penal institution as the Attorney General or his authorized representative may direct.

Appellant is presently on bail granting pending a decision on a motion for judgment of acquittal.

The above-named apellant hereby appeals to the United States Court of Appeals for the Ninth Circuit from the above judgment.

Dated at Anchorage, Alaska, July 9, 1958.

EVERETT HEPP,
Attorney for Defendant
Wright.

By /s/ WENDELL P. KAY.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 9, 1958.

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL

The defendant, James Burton Ing, moves the Court to grant him a new trial for the following reasons:

1. The Court erred in denying defendant's motion for acquittal made at the conclusion of the evidence.

2. The verdict is not supported by substantial evidence.

3. The Court erred in charging the jury, and in refusing to charge the jury, as requested by the defendant; particularly, the Court erred in refusing to instruct the jury that the witnesses Brownfield and Walker were accomplices.

4. The Court erred in submitting the question of corroboration of an accomplice to the jury, there being no corroborating evidence.

5. Newly discovered evidence, unknown to the defendant at the time of trial, consisting of admissions by the witness Brownfield that his evidence was coerced and false; that such evidence is material and would undoubtedly have produced an acquittal had it been known at the time of the trial; that failure to learn of such evidence was not due to lack of diligence on the part of the defendant; that such evidence is so conclusive as to destroy the credibility of the witness Brownfield; that copies of letters constituting this newly discovered evi-

dence are attached to this motion and made a part hereof by reference.

/s/ WENDELL P. KAY,
Attorney for Defendant Ing.

From C. K. Brownfield, 15265.

April 2, 1958.

To Mr. Joseph J. Janas, 6007 S. Komensky, Chicago, Ill.

Dear Joe:

I have not written before because as a transfer here I had to have my correspondence list okayed again. They have some rules here that are different than McNeil Island. I suppose you are working hard and will be glad that spring is about here as it will make driving the truck easier. Now about my case: As you know Alaska placed a detainer against me in April of 1957. During all the time since then I have tried to get it dropped and had no luck until last February. Actually I always felt it was a move on their part to force me to testify in the check case. During the talks I had with different people they all told me what would happen if I didn't cooperate the way they wanted me to. In this respect they accomplished their purpose, as I felt if I didn't do what they wanted I would probably be railroaded on the new charges. I was ready to testify about anything, or about anybody, just as

they wanted, and I did this, trying to help myself. I think that almost anybody would have done the same if they had been in the same position. I have been hounded about the matter ever since I plead guilty in 1956 and didn't know what else to do. A person gets in a spot like that and they are willing to tell any sort of untruths or any kind of story to try to help themselves. I don't guess this will interest you very much, but I know you have heard all kinds of stories about what happened so thought I would explain some of it to you. I know I did Ing a wrong and wish I had the opportunity to right it. Guess there is not much news from here so I will close and hope you will write soon and tell me the news. I never hear from any one other than Sandy and you. Maybe you can give me some advice on everything. If there is anything you want to ask me then feel free to do so. How is the family and everyone? It won't be long until you will be playing golf. Hope you drink a beer on the ninth hole for me.

Hope you find time to write a few lines. How is George and Dora? Let me hear from you now.

/s/ KEN.

From C. K. Brownfield, 15265.

April 9, 1958.

To Mr. Joseph J. Janas, 6007 S. Komensky, Chicago, Ill.

Dear Joe:

I wrote a couple of letters this week but still have one left so thought I would drop you a few lines. How are you and the family? Fine I hope. Guess both boys are growing like weeds and doing good in school. How are you doing in your bowling and golf? It won't be long until you will be out on the green trying to hit the ball hard and straight. Also be sure and put straight. Ha! Ha!

There is not much I can say in regard to the trial at Anchorage. Guess it wouldn't interest you anyhow. When I was taken back there I did not want to go but in order to get the charges against me dropped I was told I would have to testify. Also was told what I would have to say. Guess it didn't make any difference if it was the truth or not. Anchorage was not interested in the truth, just wanted to convict Ing any way possible. I was perfectly willing to go along with them in any story they wanted as they told me it was the only way I could help myself in regard to my charges. Guess that is neither here nor there now. All they were interested in was convicting Ing even if it was necessary to go to any length to do it. Naturally I was under pressure when I was forced to testify. Guess that is all for that. We have been having nice weather here and have been able to go out on the recreation field on the week ends. Sure is good to get a little fresh air and sunshine. We will probably have some rain this month and then have a bit of summer weather. I hope so anyhow.

Well I will close for now and hope you write how the golf is and all the news. How are George and Dora? Tell them hello for me.

/s/ KEN.

Receipt of Copy acknowedged.

[Endorsed]: Filed July 9, 1958.

[Title of District Court and Cause.]

STATEMENT OF POINTS RELIED ON

1. The Court erred in denying defendant's motions to dismiss the indictment.

2. The Court erred in denying defendant's motion for judgment of acquittal, made at the close of the evidence offered by the Government.

3. The Court erred in denying defendant's renewed motion for judgment of acquittal, made at the close of all the evidence.

4. The Court erred in refusing to give the instruction requested by the defendant, that the witness John Walker and the witness Claude Brownfield were accomplices.

5. The Court erred in refusing to give the instruction requested by the defendant that the witness John Walker was an accomplice.

6. The Court erred in refusing to instruct the jury as requested that the witness Claude Brownfield was an accomplice.

7. The Court erred in instructing the jury as follows:

"This indictment is a mere allegation of the charges against the defendants and is not, in itself, any evidence of guilt, and no juror should permit himself to be influenced against the defendants because of the fact that an indictment has been returned against the defendants.

"To this indictment the defendants, James Burton Ing, Raymond Wright, and Charles E. Smith, have pleaded not guilty, which pleas are a denial of the charges and put in issue every material allegation of the indictment.

"It, therefore, becomes the duty, and it is incumbent upon the Government to prove every material element of the charges contained in the indictment to your satisfaction beyond a reasonable doubt.

"The exact date of the commission of the crime charged in the indictment is not material provided the crime was committed within five years prior to the date of the indictment. It is sufficient if you find the crime so charged was committed on any date within five years prior to the date of the indictment.

"The law presumes every person charged with crime to be innocent. This presumption of innocence remains with the defendants throughout the trial and should be given effect by you unless and until, by the evidence introduced before you, you are

convinced the defendants are guilty beyond a reasonable doubt,"

to which objection was made and exception allowed.

8. The Court erred in instructing the jury as follows:

"In this case, the Government relies in part upon the testimony of admitted accomplices.

"You are instructed that an accomplice is one who, being of mature age and in possession of his natural faculties, cooperates with or aids or assists another in the commission of a crime.

"With respect to such testimony, the laws of Alaska provide as follows:

" 'A conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely shows the commission of the crime or the circumstances of the commission.'

"The provision of Alaska law which is quoted means that the corroborating evidence required to be given before conviction can be had must, in itself, and independent of all accomplice testimony, tend to connect the defendants with the commission of the crimes charged against them, and must tend to show not only that the crimes have been committed, but that the defendants were implicated in them. Corroborating testimony need not be direct; it may

be circumstantial; and, whether direct or circumstantial, if it corroborated the testimony of an accomplice in a material particular and tends to connect the defendants with the crimes charged, it is sufficient to meet the requirements of the statute and support a conviction.

"This law does not mean that the corroborative evidence alone must be sufficient to justify conviction, but it does require that unless in your judgment the corroborative evidence alone and by itself tends to connect the defendants with the crimes charged, the defendants should be acquitted, no matter how convincing the accomplice testimony may be.

"If you find that the corroborative evidence alone, if any, does tend to connect the defendants, or any of them, with the commission of the crimes charged against them, then you should consider all of the evidence against such defendant or defendants, including all accomplice testimony, and if all of the evidence, including both that of the acomplices and that of the corroborative testimony, convinces you beyond a reasonable doubt of the guilt of the defendants, or any of them, you should render a verdict accordingly; otherwise the defendants, or any of them, should be acquitted.

"Section 58-5-1, Compiled Laws of Alaska, 1949, provides in part as follows:

" 'That the testimony of an accomplice ought to be viewed with distrust.'

"You are accordingly instructed that the testimony of the government witnesses, self-confessed accomplices in the commission of the crimes charged in the indictment in the case now on trial before you, ought to be viewed with distrust,"

to which objection was made and exception allowed.

9. The Court erred in instructing the jury as follows:

"You are instructed that all persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the crime or aid and abet in its commission, though not present, are principals, and to be tried and punished as such. However, one who is merely present, but does nothing to aid, assist or abet or induce the other to commit the crime is not guilty. It must be shown that he actually participated in its commission from which it follows that if the evidence warrants you may find one of the defendants guilty and the other not guilty. Therefore, if you find from the evidence beyond a reasonable doubt that the defendants, acting either in concert or in pursuance of a previous understanding or common design, committed the crime charged in the indictment, each would be guilty as principal regardless of which of them uttered and published the checks in question, for it is immaterial to what degree any one of them participated in the commission of the crime so long as you find beyond a reasonable doubt that any one knowingly

aided, abetted or assisted the others, or any of the others, in its commission,"

to which objection was made and exception allowed.

10. The verdict is contrary to the weight of the evidence.

11. The verdict is not supported by substantial evidence.

12. The Court erred in failing to grant the defendant's motion for a new trial.

13. Other manifest error appearing of record, to which objection was taken and exception reserved.

Dated at Anchorage, Alaska, September 3, 1958.

/s/ WENDELL P. KAY,
Attorney for Defendant
James Burton Ing.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 3, 1958.

[Title of District Court and Cause.]

APPELLANT RAYMOND WRIGHT'S STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL

Comes now Appellant Raymond Wright and advises the Court that on his appeal he intends to

rely upon each and all of the following points, to wit:

1. Insufficiency of the evidence to establish the charge or to support the verdict and/or judgment on the charge contained in the indictment.

2. That the District Court and the Judge thereof erred in denying appellant's motion made at the conclusion of all the evidence in the case for a judgment of acquittal.

3. That the verdict is contrary to the weight of the evidence.

4. That the verdict is not supported by substantial evidence.

5. That in the absence of any corroborating testimony other than that furnished by the accomplices, no question of fact remained to be submitted to the Jury.

6. That Section 66-13-59 of the Alaska Compiled Laws, Annotated, is controlling, and that in the absence of independent corroboration was sufficiently compelling to grant the motion for judgment of acquittal.

Dated this 10th day of November, 1958.

/s/ EVERETT W. HEPP,
Attorney for Appellant
Raymond Wright.

[Endorsed]: Filed November 10, 1958.

[Title of District Court and Cause.]

M. O. RENDERING ORAL DECISION ON MOTION FOR NEW TRIAL(LS)

Before the Honorable J. L. McCarrey, Jr., District Judge.

Arguments having been had heretofore and on the 8th day of August, 1958, September 29, 1958, and October 31, 1958;

It Is Ordered, Court now indicates that it would not grant motion for new trial based on the recantations of the witness Claude Brownfield, and that the matter should be disposed of by the Ninth Circuit Court of Appeals.

United States of America,
Territory of Alaska,
Third Division—ss.

I, the undersigned, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that this is a true and full copy of an original document on file in my office as such clerk.

Witness my hand and the Seal of said Court this 21st day of July, 1959.

/s/ WM. A. HILTON,
Clerk of the District Court.

By /s/ JO ANN MYRES,
Deputy.

Entered February 6, 1958.
[Endorsed]: Filed July 23, 1959, U.S.C.A.

In the District Court for the District of Alaska, Third Division

Cr. No. 3772

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES BURTON ING, RAYMOND WRIGHT, CHARLES E. SMITH, JOHN WALKER, DEWEY TAYLOR, and LEMUEL, ASHLEY WILLIAMS,

Defendants.

Before: The Honorable J. L. McCarrey, Jr., U. S. District Judge.

TRANSCRIPT OF PROCEEDINGS

Anchorage, Alaska

February 19, 1958, 10:00 o'Clock A.M.

Appearances:

For the Plaintiff:
WILLIAM T. PLUMMER,
United States Attorney.

For the Defendant Ing:
WENDELL P. KAY,
Attorney at Law, and
T. N. GORE,
Attorney at Law.

For the Defendant Wright:
EVERETT HEPP,
Attorney at Law.

For the Defendant Smith:
BUELL A. NESBETT,
Attorney at Law.

The Court: This was the time set down to try the case of United States of America, Plaintiff, vs. James Burton Ing, Raymond Wright, Charles E. Smith, John Walker, Dewey Taylor, and Lemuel Ashley Williams, Defendants, Criminal No. 3772. Is counsel for the Government ready to proceed at this time?

Mr. Plummer: Your Honor, I am ready to proceed with the picking of the jury. I am expecting a long distance call which will probably affect the scope of the evidence I am going to present. I should have it before noon. I advise the court of that because I will want it. I think I owe it to the court and to the jury and to the defendants, certainly, to have that information so that my opening statement will show what I am going to prove. If it's not here by noon or by the time we finish picking the jury I will at that time ask the court for a continuance until the afternoon.

The Court: Is there objection, counsel for the defense?

Mr. Kay: On behalf of the defendant Mr. Ing, I have no objection to the brief, possibly, delay outlined by the United States Attorney, your Honor.

The Court: Very well. I presume other counsel take the same position.

Mr. Nesbett: I have no objection.

Mr. Hepp: My name is Everett Hepp. I am from Fairbanks. I'd like to be entered as attorney of record for the defendant [6*] Raymond Wright.

The Court: Very well. Motion is granted.

Mr. Hepp: I have no objection to the delay.

Mr. Kay: It is understood Mr. T. N. Gore, also of Fairbanks, is co-counsel with me on behalf of the defendant James Ing.

The Court: Very well.

Mr. Plummer: I will promise the court and counsel that the delay, if in fact I do have to ask for it, will be of very short duration.

The Court: Thank you. Now, to make the record clear, Mr. Hepp has entered his appearance. Will you do that formally, Mr. Hepp, at your convenience?

Mr. Hepp: Yes, I will do that.

The Court: Mr. Gore, will you likewise do the same thing?

Mr. Gore: Yes, your Honor.

The Court: Mr. Nesbett appears for the defendant Smith. I think that covers all the defendants. Are there any other counsel? Hearing none, then you may call the roll of the jury, please.

(Thereupon, the Deputy Clerk called the roll of the Petit Jury.)

***Page numbering appearing at foot of page of original Reporter's Transcript of Record.**

Deputy Clerk: All members of the Petit Jury present, your Honor.

The Court: Since we have visiting counsel from out of [7] the City of Anchorage, I'd like to advise Mr. Hepp and Mr. Gore that it is the practice of this Court under the rules to question the jurors on voir dire and you, of course, are allowed to supplement those questions after the Court has concluded its examination on voir dire.

I point out to you, Mr. Kay has submitted to the court a number of questions which he has asked that the court put to the jurors. Mr. Nesbett, do you have any questions?

Mr. Nesbett: I have some I'd like to submit at this time.

The Court: Very well. Will you hand it to the bailiff then, please?

Also, out of fairness to visiting counsel, I'd like to advise you that it is the practice of the court to draw 12 names and they take their places in the box. Then, thereafter, all the jurors are sworn at one time to preclude the lengthy swearing of each juror individually and I call this to your attention in case you have any exception or have any suggestion you want to make to the court at this time in respect thereto. Mr. Nesbett and, of course, Mr. Kay are familiar with that type of procedure.

Now, Mr. Hepp, do you have any prepared questions you would like to submit to the court at this time?

Mr. Hepp: No, I have none.

The Court: Very well. I think your co-counsel

have covered most of the aspects of that phase and it is very helpful [8] to the court. The court appreciates counsel doing that.

Would the clerk of the court then please put all the names in the box and draw 12 names and as your names are drawn will you please come forward and take your places in the box in the order heretofore outlined to you.

Whereupon, the Deputy Clerk proceeded to draw from the trial jury box, one at a time, the names of the members of the regular jury panel of petit jurors and after examination by the Court, counsel for both plaintiff and defendants exercised their challenges against said jurors, until the jury of twelve jurors was complete, and the Deputy Clerk then proceeded to draw from the trial jury box, two names of the members of the regular jury panel of petit jurors to serve as alternates and after examination by the Court, both plaintiff and defendants exercised their challenges against said alternate jurors, until the alternate jurors of two was complete. Whereupon, said jury was duly sworn to well and truly try the cause and a true verdict render in accordance with the evidence and the instructions of the Court.

The Court: Very well. Mr. Plummer, you may make your opening statement at this time.

(Whereupon, William T. Plummer, United States Attorney, made his opening statement.)

The Court: Very well. Now, do counsel for [9]

the defense desire to make their opening statements at this time?

Mr. Kay: I wonder, your Honor—may I inquire as to how long the court intends to continue in session this evening?

The Court: Well, what is the pleasure of counsel?

Mr. Kay: I wondered if you had a 4:30 engagement.

The Court. I do not have.

Mr. Kay: I see. Well then, may I confer briefly here?

The Court: Yes, you may do so.

Mr. Nesbett: Your Honor, as to the defendant Smith, we, of course, reserve in accordance with the statute our right to make an opening statement at the close of the Government's case. At this time I do not desire to make an opening statement.

The Court: Very well. Mr. Hepp.

Mr. Hepp: My position for the defendant Raymond Wright is the same as stated by Mr. Nesbett. It is rather awkward with three defendants with antagonistic interests to make a combined opening statement so I would like to reserve.

The Court: Very well. Mr. Kay.

(Whereupon, Wendell P. Kay, attorney representing Defendant Ing, made his opening statement.)

The Court: Mr. Plummer, you may call your first witness.

Mr. Plummer: I notice, your Honor, it is nearly

time for the break. May we have our break before calling the witness?

The Court: We had it a few moments ago. I am—— [10]

Mr. Kay: It has been an hour. I will join with Mr. Plummer.

The Court: Very well. Court will go into recess for a period of 10 minutes.

(Thereupon, at 4:10 o'clock p.m., following a 10-minute recess, court reconvened and the following proceedings were had:)

The Court: Let the record show all the jurors are back and present in the box. Mr. Plummer, you may call your first witness.

Mr. Plummer: I request that Mr. Taylor take the stand.

DEWEY TAYLOR

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

Mr. Hepp: May it please the Court, before any questions are put to this witness, I'd like the Court to invoke the rule regarding other witnesses.

The Court: Would you, for the record, state your reason.

Mr. Hepp: Well, the conventional reason that the testimony elicited from one is heard by others and sometimes may bear on their credibility. We believe we have a right that a witness' statement

(Testimony of Dewey Taylor.)

is his own and original statement and not even [11] possibly influenced by what he may have heard another witness say.

The Court: Now, to familiarize you, counsel, with the Court's practice here at Anchorage. The Court has always permitted the investigating officer, one only, to remain in the courtroom and also that if the defendant invokes the rule then that defendant will take the stand as the first witness, if he takes the stand at all.

Mr. Hepp: Well, I fail to understand the Court's position in that matter. There are three defendants. Which one of them would be first?

The Court: Yours, because you are invoking the rule.

Mr. Hepp: I wasn't acquainted with that.

The Court: That is why I was trying to call it to your attention.

Mr. Kay: May we confer a minute on that.

The Court: Yes, you may do so.

(After defense counsel conferred, the following proceedings were had:)

Mr. Hepp: May it please the Court, the defendant Wright's position in this matter is that he would like to have the rule invoked, but objects to the other portion of the rule which the court has stated here in connection with having to lead off with the defense and take the witness stand first.

The Court: And you understand that's a condi-

(Testimony of Dewey Taylor.)

tion only [12] in the event that he is called as a witness at all?

Mr. Hepp: Yes, I understand that. I would like the record to show my objection to that.

The Court: Your objection may stand. The ruling of the Court will also stand.

The Court at this time then instructs all witnesses who may be called to absent themselves from the courtroom. I will look to counsel to advise the Court as to whether or not any of their witnesses are in the courtroom.

Mr. Plummer: Everybody that is going to be called as a witness for the Government, you will have to wait out in the foyer.

The Court: Now, that would also be true—I understood Mrs. Ing might be called, Mr. Kay.

(Thereupon, witnesses leave the courtroom.)

Mr. Plummer: I think the Government witnesses are gone, your Honor.

The Court: Mr. Hepp.

Mr. Hepp: I'd like to address the Court one more time. May it please the Court, there is an understanding as to the nature and type of raising ojections for defense counsel. The thought has certainly occurred to me in order to dispell any possible inferences drawn by any of the jurors by reason of the fact one or more of the defendants do not make the objection that he acquieces in that testimony or that offer that is made to the Court, and I, therefore, ask the Court if it would [13]

(Testimony of Dewey Taylor.)

instruct the jury the essence of the manner of objecting which is permitted to counsel. This, of course, is brought about by the fact there are three of us independently.

The Court: Ladies and gentlemen of the jury: At the bench the subject came up as to whether or not all counsel would necessarily have to get up and make an objection in order to have one as to a ruling of the Court. Mr. Hepp, for example, said it would be more or less repetitious to have each one get up individually to object each time as an objection came up and without objection on the part of the Government it was agreed at the bench that an objection by one of defense counsel would avail to the other two defendants. I instruct you that that is the agreement that the Court and counsel have entered into and so you may consider that in your overall consideration of the case.

Does that cover the subject, counsel?

Mr. Hepp: Thank you, your Honor.

The Court: Now, of course, I'd like to have it understood that that would not be true as to instructions and things of that nature. I have been trying to consider that a little bit since you made that request, Mr. Hepp. There may be other cases and circumstances when it likewise should not apply, however, as a general premise I see no objection to that. Is that the practice of Judge Forbes in Fairbanks, for example?

Mr. Hepp: I have known it to occur once where

(Testimony of Dewey Taylor.)

joint [14] defendants with antagonistic interests, each one represented by his own counsel.

The Court: Of course, that is the only basis for granting it now because I understood there are antagonistic interests by the respective defendants. Aside from that it would not be proper to enter into such an agreement or understanding. Very well. Then you may proceed, Mr. Plummer.

Mr. Plummer: Thank you, your Honor.

By Mr. Plummer:

Q. Would you please state your name, sir?

A. Dewey Taylor.

Q. Would you speak up?

A. Dewey Taylor.

Q. Where do you reside, Mr. Taylor?

A. 305½ Flower Street in Mountain View.

Q. And are you the Dewey Taylor that is mentioned in this indictment? A. I am.

Q. Have you previously been before this court and pleaded guilty to Counts 12, 13, 14, 15, 16, 17 and 18 of the indictment? A. I have.

Q. Do you know the defendant in this case, James Burton Ing? A. I do.

Q. Do you know the defendant in this case, Raymond Wright? A. I do. [15]

Q. Did you have occasion, sir, to have a conversation with Mr. Wright during the month of August, 1956, in Fairbanks? A. I did.

Q. And where did this conversation occur?

Mr. Hepp: I object to that unless proper founda-

(Testimony of Dewey Taylor.)

tion is laid that it pertains to the charges before this court. It is a very general question; could invite a possible dangerous answer which I have no chance to evaluate. I think he should point out its relationship to the charges before the Court. A conversation could cover anything.

Mr. Plummer: I was afraid I would be accused of leading the witness if I didn't lay a foundation first.

The Court: Well, an objection has been made. I understood that counsel for the Government was in the process of laying that foundation. If it is not properly laid then I would suggest that you make a further objection, Mr. Hepp. In the meantime, would you please lay the foundation, Mr. Plummer?

Q. (By Mr. Plummer): Where did this conversation occur, sir?

A. In Mr. Wright's car.

Q. And about what date, if you recall?

A. Oh, it was during the first part of the week or the week end before Labor Day.

Q. And who all was present during this conversation, sir? A. Just he and I. [16]

Q. When you say he and I, you mean Raymond Wright and yourself? A. That is right.

Q. And will you tell us what that conversation was about, sir?

A. Well, he asked me if I wanted to make some easy money. Well, I was a little bit destitute, kind of needed some money. I said yes.

(Testimony of Dewey Taylor.)

Q. Now, if you will tell the conversation to the best of your recollection?

A. Oh, he just informed me about this caper that was supposed to take place down here in Anchorage and——

The Court: Pardon me. Would you read that first part back.

(Thereupon, the Reporter read Answer Line 9 above.)

The Court: Thank you.

Q. (By Mr. Plummer): What do you mean by caper, Mr. Taylor?

A. Well, the passing of the M.K. checks and my instructions as to what I was to do.

Q. And would you tell us what the conversation was, as you recall it, on that occasion, sir, between you and Mr. Wright?

A. Well, he suggested I go to the Territorial Police and get a driver's license and conversation come up about what name to get and so the first name that we decided on was James C. Woods. So I went to the Territorial Police and got the identification. [17]

Q. And did he advise you, sir, in any other respect or any other regard at that time?

A. Well, he told me we would leave Friday, sometime Friday evening, and to keep my mouth shut about it.

Q. That is to leave Fairbanks sometime Friday evening and where were you going, sir?

(Testimony of Dewey Taylor.)

A. To Anchorage.

Q. And prior to your leaving did Mr. Wright do anything to you?

Mr. Hepp: Object to that. I believe that some offer should be made which we can evaluate.

The Court: Yes. Objection sustained.

Q. (By Mr. Plummer): Was a picture taken of you prior to your departure from Fairbanks?

A. It was a picture taken but it didn't come out well, so there was another one taken of me after the morning—before the next morning.

Q. And who was that picture taken by, sir?

A. Mr. Wright.

Q. And where was it taken?

A. I beg your pardon?

Q. Where was it taken, if you recall? Where were you at the time the picture was taken, sir?

A. Let me see. Well, he had taken one of me at his place in Fairbanks and that one didn't come out, so, well—so he took [18] one of me that morning in the rooming house where I stayed.

Q. And did you retain custody of that picture after it was taken?

A. No, it was stamped on an identification card.

Q. Now, did Mr. Wright tell you what your part of this M.K. check caper was going to be?

A. He did.

Q. Would you tell me what your part was?

A. Well, I was supposed to—wait a minute—how do you mean?

(Testimony of Dewey Taylor.)

Q. Well, just tell me what his instructions were, if in fact he gave you any instructions.

A. You mean prior to going to Anchorage or what?

Q. Yes, sir.

A. Well, on the way down he told me I was supposed to pass the checks and I would have the proper identification and if anyone asked me as to where I was working, as to the identification, I was supposed to say I was working up in Point Barrow.

Q. Any instructions about how you were to dress?

A. As a working man in work clothes.

Q. Now, was any mention made about the pay you were supposed to get for doing this, the cut you were supposed to get?

A. I was supposed to get 25 per cent, half of what I took in.

Q. Now, did you in fact go to Anchorage?

A. I beg your pardon? [19]

Q. Did you in fact go to Anchorage, Mr. Taylor?

A. I did.

Q. When did you depart Fairbanks for Anchorage? A. Left late Friday evening.

Q. And how did you go down to Anchorage from Fairbanks?

A. We came in Mr. Wright's car.

Q. When you say we, who do you mean, sir?

A. Myself, John Walker and Raymond Wright.

Q. And did you have any conversation about

(Testimony of Dewey Taylor.)

what you were going to do when you got to Anchorage on the way down?

A. Well, he told me that I would get a room and that I was supposed to just pass the checks. That is all.

Q. Any particular locale, any place you were supposed to pass them or not pass them?

A. Any place where possible.

Q. Was the word East Chester Flats mentioned?

A. Yes, I was supposed to steer clear of East Chester Flats because I was known there as a musician and entertainer.

Q. When did you arrive in Anchorage, if in fact you did arrive?

A. Oh, about 11:30 the Friday night preceding the Labor Day week end.

Q. And when you say we again, you mean who?

A. Myself, Wright and Walker.

Q. And what did you do upon arriving in Anchorage, sir?

A. Well, we went to the Hot Spot—was the International Club [20] then—and had a few drinks.

Q. And did you and Walker and Wright stay together? A. No, we did not.

Q. Did you stay together while you were at the Club International?

A. I drank—had a few drinks, like that, then we left.

Q. And did you leave there together?

A. We did.

Q. And where did you go, sir?

(Testimony of Dewey Taylor.)

A. The place now—I couldn't find it now if I had to. I mean, I don't remember the place. It was dark. It wasn't on the same street as the Hot Spot or the Club International. It was on another street.

Q. Was it some place down in the Flats, sir?

A. Yes.

Q. And what did you do after you arrived at that place?

A. Well, I went to this room and went to bed.

Q. And did all of you stay there?

A. No, just Walker and I.

Q. And was anybody else present that you knew?

A. I didn't see anyone. I didn't know anybody. I could hear voices. I imagine there was other people in the house.

Q. Did Mr. Wright stay with you?

A. No, he did not.

Q. Do you know where he did stay?

A. No, I don't. [21]

Q. When, if any time, did you again see Mr. Wright?

A. The following morning, Saturday morning.

Q. And would you tell us what happened on that occasion, sir?

A. Well, he took this picture of me and put it on the identification card and gave me 15 checks.

Q. And were they Morrison-Knudsen checks?

A. They were.

Q. And what else happened, sir?

A. Then he gave Walker some checks, I don't know how many, and we took this car. We went out

(Testimony of Dewey Taylor.)

to Spenard and he told me to cash them wherever possible.

Q. And did you in fact do so?

A. That is what I did.

Q. What did you do with the purchases, merchandise you purchased, sir?

A. Put it in the car.

Q. And what did you do with the money that you got?

A. I kept that in my pocket until I got back.

Q. And what did you do with it then, sir?

A. I turned it all over to Mr. Wright.

Q. Now, this was on a Saturday you are telling us about, is that right?

A. That is right.

Q. All right. Will you tell us if the same thing occurred again on Sunday? [22]

A. It did.

Q. Do you know whether or not Mr. Wright passed any of the checks?

Mr. Hepp: Object to that unless—how would this witness know that?

The Court: The question was, as I recall, do you know whether or not Mr. Wright passed any checks.

Mr. Hepp: Then I ask for just a yes or no, then——

The Court: Well——

A. I do not know that anyway.

The Court: Then it is not before the Court, having answered without the Court ruling. You may proceed.

(Testimony of Dewey Taylor.)

Q. (By Mr. Plummer): Did you as a matter of fact cash all the original 15 checks that were given to you? A. I did.

Q. What did you do after the original 15 checks were exhausted? A. I was given 15 more.

Q. And who gave them to you?

A. Mr. Wright.

Q. And did you cash those, sir?

A. All excepting two.

Q. That would make 28 checks in all that you cashed, is that correct, sir?

A. That is right. [23]

Q. Now, Mr. Taylor, approximately how much did you receive in cash for the 28 checks that you testified that you cashed?

A. You mean as my part or what?

Q. No, I mean the overall total that you got back in cash? A. About $4,600.00.

Q. And out of that $4,600.00 how much did you receive as your cut? A. $2,300.00.

Q. Now, did you receive any of the merchandise that you purchased?

Mr. Hepp: Object to that. I don't think this witness has testified that he purchased any merchandise. Counsel said something about what happened to some merchandise.

The Court: Objection sustained.

Q. (By Mr. Plummer): Did you as a matter of fact purchase any merchandise when you cashed the checks?

(Testimony of Dewey Taylor.)

A. I had to in order to cash them.

Q. And did you—I will ask the question now, your Honor. Did you retain any of this merchandise that you purchased?

A. I bought an electric razor.

Q. Is that the only item you purchased and retained? A. That is all.

Q. And do you still have that, sir?

A. No, I don't. [24]

Q. Do you know—tell us what happened to it.

A. I traded it off in Seattle because it never worked for me.

Q. And now, will you be good enough to tell us, sir, when you left Anchorage, if in fact you did leave?

A. The following Monday morning preceding Labor Day between 10:00 and 11:00 o'clock.

The Court: Pardon me. That answer isn't understandable. You say, the following Monday morning preceding Labor Day.

The Witness: Before Labor Day. No, that was Labor Day morning. That is right. Labor Day morning was on a Monday.

The Court: Thank you.

Mr. Plummer: Thank you, your Honor.

Q. (By Mr. Plummer): And about what was the time again?

A. Oh, approximately—I can't be sure. I think it was between 10:00 and 11:00, something like that.

Q. What was your reason, if any, for leaving at that time?

(Testimony of Dewey Taylor.)

A. We were ready to go back to Fairbanks.

Q. Now, when you say we, were you by yourself or was someone with you?

A. No, the same three that came down.

Q. You, Mr. Wright and Mr. Walker?

A. That is right.

Q. How did you go back?

A. In the same car we came in. [25]

Q. Now, did you make any stops en route? Did you stop in Palmer?

A. We stopped in Palmer, yes.

Q. And were any checks cashed in Palmer?

A. Yes, I cashed one at Koslosky's, and a filling station.

Mr. Kay: Your Honor, I object. I probably should have objected earlier but the answer was given before I had an opportunity to object. I object to any attempt to prove the commission of other crimes other than those alleged in the indictment.

The Court: The objection is sustained. I think the reason is obvious.

Q. (By Mr. Plummer): Now, with the exception of Palmer did you make any stops en route? I take it that you eventually, all three, arrived back in Fairbanks, is that right? A. Yes.

Q. Now, did you stop any place along the highway en route to Fairbanks after leaving Palmer?

A. We stopped once that I know of. No—yes, we stopped.

(Testimony of Dewey Taylor.)

Q. And would you tell me what was the reason for you stopping at that time, sir?

Mr. Hepp: I object unless it relates to the issues before this Court.

Mr. Plummer: It does. I will advise the Court that.

The Court: On that promise the objection is overruled. You may proceed. [26]

Q. (By Mr. Plummer): Would you tell us why you stopped on that occasion, sir?

A. Well, we stopped—Mr. Wright instructed me to get rid of the clothes that I had worn in Anchorage.

Mr. Hepp: I object to that as not responsive to the question. He asked where he stopped.

Mr. Plummer: I asked him why he stopped, not where he stopped.

The Court: The first question before was where he stopped and now you rephrase your question as to why he stopped. I think you are correct. The objection is overruled.

Q. (By Mr. Plummer): Why did you stop, sir?

A. We stopped to dispose of the clothing that I had worn in Anchorage.

Q. And did you in fact dispose of them?

A. I did.

Q. How did you do that?

A. I burned them.

Q. And did you stop another time prior to arriving at Fairbanks?

A. Yes, we stopped one more time.

(Testimony of Dewey Taylor.)

Q. And would you tell me why you stopped on that occasion?

A. Well, we met some people in a car.

Q. And were they driving the same direction you were?

A. No, they were coming the opposite direction, from Fairbanks. [27]

Q. Were they people that you knew?

A. I knew one of them that I can remember.

Q. And did that car stop also?

A. Yes, it did.

Q. And did you alight from your car and have some conversation?

A. Well, we stopped and passed the bottle around.

Q. And the defendant Wright was present at that time, was he? A. He was.

Q. And did he have some conversation with this party? A. Yes, he did.

Q. And what is the party's name?

A. Richard Burge.

Q. And will you tell us what that conversation was with Mr. Burge?

A. Well, he showed Mr. Burge a suitcase of money.

Q. The money that you had turned in to him?

A. The money, it was from the—down from this thing down here.

Q. All right. Then what happened after that, sir. A. We proceeded to Fairbanks.

(Testimony of Dewey Taylor.)

Q. And what happened after you got to Fairbanks?

A. We unloaded the merchandise and——

Q. Would you tell me where you unloaded the merchandise, sir?

A. We unloaded the merchandise at the Beachcomber, Mr. Wright's residence.

Q. And would you tell us where you placed it in the residence, if you know, if you remember? [28]

A. We placed the perishables in the kitchen and took the rest of the merchandise upstairs.

Q. What happened next, if anything, sir?

A. Then I was paid off and told to keep my mouth shut.

Q. Do you recall anything about that conversation?

A. Yes, I was told to keep my mouth shut or otherwise I could lose my life.

Q. And that conversation was with Mr. Wright?

A. It was.

Q. And he is the one that paid you off?

A. That is right.

Q. And what again was the amount that he paid you? A. $2,300.00.

Mr. Kay: Object now as showing—attempting to show again the commission of other crimes. The amount includes, apparently, checks other than those alleged in the indictment and, as I said, I didn't get an opportunity to object when he first testified concerning this total amount but it far exceeds the amount claimed in the six counts in the indictment

(Testimony of Dewey Taylor.)

and it is an attempt to show separate crimes and I object to it.

Mr. Plummer: I do not intend to show any separate crimes and I didn't allege any separate crimes and I am not trying to prove any separate crimes.

Mr. Kay: Then you should have no objection to withdrawing the question. [29]

Mr. Plummer: I am asking the question. He testified he paid him over—I asked him how much. He said $2,300.00. Certainly there is no indication except by your mentioning it of other crimes.

Mr. Kay: That exceeds the amount contained in the six counts of the indictment.

The Court: Well, of course, there again I haven't tabulated it. I don't know.

Mr. Kay: Well, I have and it exceeds it considerably.

Mr. Plummer: No mention was made of any crimes, your Honor, except by Mr. Kay.

The Court: The objection will be overruled to this last question, Mr. Kay.

Mr. Plummer: Would the reporter be good enough to read me back the last question I asked the witness?

(Thereupon, the Reporter read Question Line 12, Page 29 and Answer Line 13, Page 29.)

Q. (By Mr. Plummer): What did you do next after that, if anything, sir?

(Testimony of Dewey Taylor.)

Mr. Hepp: Excuse me. I didn't hear the question.

The Court: What did you do next after that, if anything?

Mr. Hepp: I object unless that is shown to relate to the issues before this Court or is connected with the charges that are contained in the indictment.

Mr. Plummer: It certainly does, your [30] Honor.

The Court: On your promise that it will, the objection is overruled. You may proceed.

Q. (By Mr. Plummer): What did you do next then, if anything, Mr. Taylor?

A. I took Mr. Walker to the airport but he missed the plane.

Q. And what happened then?

A. Then we decided that he would ride Outside with me.

Q. Now, was it your testimony that you knew the defendant Raymond Wright here?

A. It was.

Q. And did you have occasion to see him on March 12, 1958? A. I did.

Q. And where did you see him?

Mr. Kay: March 12?

The Court: Yes.

Q. (By Mr. Plummer): And where did you see him? A. Out on my job here in town.

Mr. Kay: That is next month.

Mr. Plummer: I am sorry, February 12. I stand corrected.

(Testimony of Dewey Taylor.)

Q. Did you see him on February 12, 1958, sir?

A. That is this one, yes.

Q. And where did you see him, sir?

A. Out on my job. Out on my job at the Club Oasis. [31]

Q. And what happened on that occasion, if anything, sir?

A. Well, I am a musician and I play with the band on the bandstand, my partner and I, Ralph Smith, were playing on my job. Mr. Wright came over to me and told me, he said, "I heard that you made a deal."

Mr. Hepp: Just a moment. I don't see the relationship of this, certainly, with the——

Mr. Plummer: Let us approach the bench and see if we can see the relationship.

Mr. Hepp: Yes, I would like to see the relationship.

Mr. Plummer: May we approach the bench?

The Court: You may do so.

(Whereupon, all counsel approached the bench and the following proceedings were out of the hearing of the jury:)

Mr. Plummer: I propose to show that on the 12th of February, 1958, the defendant Wright went to the Club Oasis where the defendant Taylor is employed and at that point he went up first to the bandstand and made threats to the defendant Taylor if he testified in this case. A short while later

(Testimony of Dewey Taylor.)

there was an intermission. The defendant Taylor then went up to the bar. The defendant Wright was at the far end of the bar. He talked in a loud voice, loud enough so his voice would carry over to the defendant Taylor, talking about canaries singing and about taking a revolver and shooting the gun and shooting the lights out of the pinball machines that were close by there. He then made the remark loud enough so the defendant Taylor could hear him that it would be better to shoot the canary, or words to that effect, rather than to shoot the lights out of the pinball machines. Subsequent to that he tried to buy the defendant Taylor a drink. The defendant Taylor declined. The defendant Taylor's partner, Ralph Smith I believe his name is, replied in a voice loud enough for Mr. Wright to hear that Mr. Wright was not the only good shot present in the club. Mr. Wright then came around and an altercation occurred so that he knocked the——

The Court: When you say he, whom do you mean?

Mr. Plummer: Wright knocked Smith off of the stool. While he was getting up he caught him with a punch. Smith ran over and got a .22 pistol and in the meantime the defendant Wright was advancing toward the defendant Taylor and when he saw the man with the pistol he grabbed the attorney, Gore, and used him as a shield so that Smith couldn't shoot him. My purpose for offering the testimony is to show that the defendant Wright

(Testimony of Dewey Taylor.)
made threats against the defendant Taylor to keep him from testifying in this case.

The Court: Mr. Hepp.

Mr. Hepp: Well, there is certainly a portion there at the outset of his account here where I believe the challenging talk was between this witness here and one other person, not the defendant Wright, and I don't think that the defendant [33] Wright would be bound by threats that I think that this other man—his name escapes me—that had threatened this witness here.

Mr. Plummer: I didn't ask him about anything that anybody else except Mr. Wright might have said to him.

The Court: That you would be limited to, to conversation or what occurred between this witness and Mr. Wright?

Mr. Plummer: Yes, sir.

The Court: Very well. Objection overruled.

(Whereupon, all counsel resumed their respective seats and the following proceedings were had in the presence of the court and jury):

The Court: You may proceed, Mr. Plummer.

Q. (By Mr. Plummer): Was it your testimony, Mr. Taylor, that you were playing on the rostrum, on the bandstand out at the Club Oasis on the night in question? A. That is right.

Q. And was it your testimony that the defendant Raymond Wright came up to you?

(Testimony of Dewey Taylor.)

A. That is right.

Q. And would you tell us what he said to you on that occasion, sir?

A. He said to me, "I hear you made a deal with the District Attorney," to which I didn't reply anything. He said, "Well, you will never live to reach the witness stand and if you do [34] and you get time, if you go to the penitentiary you will be killed and if you are released, if you hit the streets you will be killed, so you are dead, period."

Q. And did you subsequently that night have another conversation with the defendant Wright?

A. No, I didn't say anything to him. I thought it was wiser to keep quiet.

Q. Did he say anything to you at a later time that night?

A. Well, right after that intermission came up and I went to the bar, I went to one end of the bar, he and Attorney Gore were sitting at the other end of the bar. Now, whether they were serious or not I don't know, but they were drinking and Mr. Wright made a few disparaging remarks towards me and they kept talking about shooting the lights out of the pinball machines out there which were sitting directly beside me. Mr. Wright said, "No, hand me a pistol. I am a better shot than that. I can shoot that stool-pigeon," referring to me.

Mr. Hepp: Object to whatever opinion evidence as to what Mr. Wright was referring to.

The Court: The objection is sustained.

(Testimony of Dewey Taylor.)

Mr. Hepp: I ask that it be stricken from the record.

The Court: Motion is granted. It may be stricken from the record and the jurors are instructed not to consider the statement made by this witness, quote, "referring to him." [35]

Q. (By Mr. Plummer): Let me ask you, Mr. Taylor, how far away from Mr. Wright were you at the time that he made the remarks that you just mentioned?

A. Approximately, around 22 or 23 feet. From one end of the bar to the other.

Q. Would you tell us, if you can, the volume with which he said the remarks?

A. Beg your pardon?

Q. Did he say them in a loud voice or low voice?

A. Loud enough for anyone in the club to hear it.

Q. You had no difficulty in hearing the remarks?

A. No, I didn't.

Q. Did anything occur between the defendant Wright and you that night?

A. Well, he offered me a drink. He said, "Give the canary a drink," and I informed the bartender I was capable of paying for my own. I said I didn't care to have a drink with him. So he said, "Well, on second thought don't give the stool-pigeon—or the name that I couldn't say here—a drink. Why should I spend my money on him," something like that. So during that time my partner Ralph Smith

(Testimony of Dewey Taylor.)

was sitting around on the other side of the bar. He came around and sat beside me——

The Court: Pardon me. When you say he, whom do you mean?

A. Ralph Smith. [36]

The Court: Thank you.

A. My partner, he came around and sat——

Mr. Hepp: Just a moment. I believe he has responded to counsel's question. I think another offer should be made in connection with this last move. I have no chance to object.

Mr. Plummer: Let me ask this question, then. Perhaps this will remove the difficulty, if not remove your objection. Don't answer before he has a chance to object.

Q. Did the defendant Wright do anything at that time and place?

Mr. Hepp: I am not quite sure I know what time and place counsel means. At the time when this other man came around and sat down with him?

The Court: Yes. Is that true?

Mr. Plummer: Yes.

Q. Did the defendant Wright—do you care to object to the question?

Mr. Hepp: No, not if that is established.

Q. Did the defendant Wright take any action at that time of any kind?

A. Yes, he came around and sat on the other side of Mr. Smith.

Q. Were you all lined up at the bar?

(Testimony of Dewey Taylor.)

A. All three together.

Q. Who was on the left?

A. Mr. Wright was on the left. Mr. Smith was in the center. I was on the right. [37]

Q. Yes, sir. And did Mr. Wright and Mr. Smith have a conversation in your hearing at that time?

A. He said to Mr. Smith, he said, "Why——

The Court: Pardon me. Would you please state who that was when you say he. Now I think I know who you mean, but will you please say Wright said to Smith, if that is what took place.

A. Wright said to Smith, "Why do you want to stick your nose in there when it doesn't concern you?" Smith said, "Well, Taylor is my partner and we work together, we live together, and if anybody is going to do anything to him I am going to have something to say about it." And he said, "Oh, so you are going to deal yourself in on it, huh?"

The Court: Pardon me. Who said he is going to deal——

A. Wright said, "Oh, you are going to deal yourself in on this, huh," and in saying so he hauled off and hit Mr. Smith and knocked him off the stool and as he went to get up he hit him again.

Q. And what did Mr. Smith do in response to this?

A. Mr. Smith ran over to the bench. In the meantime, Raymond Wright turned around as if to start towards me and——

Mr. Hepp: I object to that and ask that it be stricken. I believe that purely calls for an impres-

(Testimony of Dewey Taylor.)

sion or opinion as if something were going to happen.

The Court: Objection sustained.

Mr. Hepp: And ask that it be stricken from the record. [38]

The Court: It may be stricken from the record and the jury is instructed not to consider the ad lib of this witness. You may proceed.

Q. (By Mr. Plummer): Would you be good enough, Mr. Taylor, to tell us not what your impression was but describe the physical movements that the defendant Wright took at that time, if any?

A. Well, at the time he knocked Smith down and Smith jumped up to run to the piano stool, well, he turned around towards me—I guess he thought maybe I was going to attack him.

Q. Just tell what he did.

Mr. Hepp: I ask that that be stricken and this witness admonished not to state what he thought was going to happen.

The Court: Mr. Taylor, you have a right to testify as to what you saw, what you heard, what you felt, and so forth, but you do not have have the right to testify as to inferences and presumptions. You may testify concerning movements or things of that nature. Would you be careful not to testify as to what you thought or what he thought and so forth.

A. All right. Mr. Wright turned towards me.

Q. (By Mr. Plummer): He moved towards you?

(Testimony of Dewey Taylor.)

A. He turned towards me. By that time Mr. Smith had the gun.

Q. And what happened then, if anything?

A. He ran—Mr. Wright ran and jumped behind Attorney Gore, [39] grabbed him, threw him in front of him as a shield, during the whole time shouting, "Give me my gun."

Q. And what happened next, if anything?

A. Mr. Wright put the pistol down. He was down near the door. I mean, Mr. Smith put the pistol down. He was down near the door, and he went on into the other room. Mr. Evans picked up the pistol and I went into the back room, too, and we locked the door.

The Court: Counsel, it is now 5:00 o'clock. The Court Reporter has been in session since 9:00 o'clock this morning and I am going way beyond her ability or endurance. I think without objection we better continue the trial at this time. If there is no objection, the trial of this case will be continued until tomorrow morning at the hour of 10:00 a.m. when it will be resumed at the American Legion Hall, which is located at the corner of Fifth and G.

As you know, ladies and gentlemen of the jury, I must now instruct you not to discuss this case among yourselves nor are you permitted to let others discuss it with you.

This court will stand adjourned until tomorrow morning at the hour of 9:30 a.m.

(Testimony of Dewey Taylor.)

(Thereupon, at 5:00 o'clock p.m., court was adjourned to the next morning, this case to be resumed at 10:00 o'clock a.m., February 20, 1958.) [40]

The Court: Will you please call the roll of the jury.

(Thereupon, the Deputy Clerk called the roll of the trial jury.)

Deputy Clerk: All members of the trial jury present, your Honor.

The Court: Very well. Mr. Taylor, will you please come forward and take the witness stand.

DEWEY TAYLOR

resumes the witness stand and testifies as follows on

Direct Examination
(Continuing)

Mr. Plummer: Before we resume the trial this morning I have several requests of the court. First, the witnesses have been excluded from the court. I will have quite a few witnesses probably coming over sometime along about 11:00 o'clock. I just wondered what we could do with them, where they could stay.

The Court: I told my secretary to instruct your secretary to put them in the cloak room. There are a number of chairs in there. I have checked and it is fairly commodious.

Mr. Plummer: One other question then. Mr.

(Testimony of Dewey Taylor.)

Charles Anderson is under subpoena to the Government. We did not intend to use him as a witness. We was trying to put him under subpoena so he could be excused from his police work so he could attend the trial and help us if we needed him. I ask at this time that [43] the subpoena be quashed so he could stay in the courtroom. I assure the court he will not be called as a witness.

The Court: Mr. Nesbett, do you have any objection? Just a moment, please. Where are the other defendants and counsel?

Mr. Nesbett: I don't know, your Honor. They were here.

Mr. Plummer: I am sorry, your Honor, I didn't realize——

The Court: I thought the bailiff would take care of that.

(All counsel and defendants are present at this time.)

The Court: To apprise counsel of the proceedings so far. I looked to the bailiff to see that counsel were here. I can't watch every detail, unfortunately. Mr. Taylor has been called to the witness stand, the jurors have been polled as to their presence this morning, and Mr. Plummer requests that the subpoena out against one Charles Anderson be quashed as they do not intend to call him as a witness. I think now I have apprised you of all the proceedings that have taken place so far. Do you recall anything else, Mr. Plummer?

(Testimony of Dewey Taylor.)

Mr. Plummer: No, your Honor, those are the only two points that I raised. I did raise another point about where the witnesses were going to stay.

The Court: That is correct, yes. Now, is there any objection, Mr. Kay or Mr. Nesbett or Mr. Hepp, as to those proceedings out of your [44] presence?

Mr. Kay: No, indeed, your Honor. I would like to make one statement this morning. I believe I am correct on the record and that is that the court undoubtedly inadvertently yesterday failed to admonish the jury as to their duty not to converse among themselves, so on so forth, concerning the case at the various recesses during the day. It was called to my attention that the court did do so at the evening.

The Court: That has been the practice of the court only at evening and noon.

Mr. Kay: Thank you.

The Court: However, to keep the record straight and since you have called it to my attention, ladies and gentlemen of the jury—and let the record show that all the jurors are back and present in the courtroom. Will counsel so stipulate?

Mr. Plummer: Yes.

Mr. Kay: Yes.

Mr. Hepp: Yes.

The Court: You are hereby instructed that you are not to discuss this case among yourselves nor are you permitted to let other people come and discuss it with you during recesses or at any time

(Testimony of Dewey Taylor.)

until the case is ultimately submitted to you for your consideration and then and only then may you discuss it among yourselves.

Mr. Kay: I wasn't implying the jury had done so, your Honor. [45]

The Court: No, I appreciate that. I am pleased to announce to counsel that I have been assured we will have the main courtroom tomorrow morning for our motion calendar, thank goodness, and also that the trial, of course, will be conducted in the main courtroom next Monday, so we won't have this problem because in the main courtroom we have accommodations for the jurors, as the jurors know, in the jury room so they do not have to go out among the public, of course, which is a service to them.

Very well. With that concluding the formalities, as far as I know, you may proceed with your direct examination.

Mr. Plummer: May the record reflect that this is the same Dewey Taylor that was a witness in the case yesterday afternoon and that he was called and administered the oath at that time.

The Court: Would you also remind him he is still under oath.

Q. (By Mr. Plummer): Mr. Taylor, you are still under oath. You realize that? A. I do.

Q. Thank you.

The Court: May this witness be excused for just a moment?

Mr. Plummer: As far as I am concerned, your Honor.

(The witness leaves the courtroom.)

The Court: I'd like to point out to counsel, since the rule has been invoked that I will look to counsel to see that their [46] witnesses are excluded from the courtroom as I do not know them. Mr. Hepp.

Mr. Hepp: May it please the court, during this time we would like to avail ourselves of examining the identifications and I do request that counsel be shown all identifications that are brought into this court before any question is put to a witness concerning the same.

Mr. Plummer: It has been my intention, your Honor, and it has been the practice of the court, of course, to reserve inspection of objects and documents and writings until they are offered in evidence. It's been done in every trial that has ever been conducted by this court.

The Court: Well, as I recall, Mr. Plummer, we have always identified them first, but surely counsel for the defense have the right to inspect them prior to the time that they are admitted in evidence.

Mr. Plummer: That is what I mean. The inspection is made at the time I make the offer into evidence.

Mr. Hepp: May I submit to the court that there could be very damaging statements made, perhaps inadmissible, in the course of laying a foundation on inadmissible instrument which the defense has no opporutnity to object if he has not seen this

matter. I don't see any harm—I don't see how the Government could be prejudiced at all in showing these identifications to defense counsel and I submit that the practice is not an uncommon [47] one in the courts to allow an inspection at the time it is marked for identification and before any question is put to the witness concerning same and then the court, of course, can rule on any question that may arise at that time.

The Court: That has never been the practice here. Does Judge Forbes do it in Fairbanks?

Mr. Hepp: Yes, sir, consistently, sir, and I might add that his predecessor did and the other courts before in which I have practiced have allowed that, too.

The Court: This is the first time it has been requested in this court.

Mr. Hepp: I further submit unless the Government can show some prejudice by reason of an inspection of some document or instrument or other identification we believe that we would be entitled to see it and I so request.

The Court: I am inclined to agree with you.

Mr. Plummer: It may be, your Honor, that I will not even offer the things in evidence, and, of course, I can't have anything except what the witness tell what it is, if he knows, prior to making the offer. That is the foundation for the offer.

Mr. Hepp: The damage, if any, is done at that point, your Honor. If it develops to be inadmissible, these statements are made to the jury, they hear them, they are necessarily concerned over the

matter and the fact that the counsel has no idea of or intention in any given instance of admitting them into [48] evidence, he shouldn't offer them in the first instance.

The Court: I concede that point.

Mr. Plummer: Of course, your problem, if you have a problem which I don't concede you do, is corrected by the court instructing the jury to disregard the testimony on the particular item that is not admitted and certainly the jury is capable of following such an instruction.

The Court: Mr. Plummer, though, let me inquire. How can the Government be hurt by granting to counsel for the defense a perusal of these proposed exhibits prior to the time that they are identified by this witness?

Mr. Plummer: I assume probably not too much so. We have always done it the other way, that is the proper way to do it, and Mr. Hepp's request is I think unreasonable, but I will gladly give them to them at this time if the court so desires.

The Court: Since there has been a request let's proceed in that fashion then.

Mr. Plummer: I would request that Mr. Hepp keep them in order, although they are marked now. It doesn't make any difference.

(Witness Dewey Taylor returned to the courtroom and resumed the stand.)

(Documents handed to defense counsel; after inspection documents were handed back to Mr. Plummer.)

(Testimony of Dewey Taylor.)

Mr. Plummer: May I now approach the witness, your Honor? [49]

The Court: You may.

Q. (By Mr. Plummer): Mr. Taylor, will you take those documents or those objects and will you look first at the exhibit which has been marked for identification only as Plaintiff's Exhibit No. 1 and inspect it closely. Now, will you tell us what that is, sir?

A. Well, this is a Morrison-Knudsen check, or reasonable facsimile of.

Q. And will you give us the number of the check? A. Check No. 8903.

The Court: Speak a little louder so the jurors can hear.

A. This is Check No. 8903.

Q. Who is it made payable to?

A. Made payable to James C. Woods.

Q. Now, would you look at the reverse side of the check, sir. And is there any writing on the reverse side of the check, sir?

A. Say that again?

Q. Is there any writing, endorsement on the reverse side? A. Yes, there is.

Q. Would you tell me what that endorsement is?

A. James C. Woods.

Q. Now, will you tell me, if you know, who wrote James C. Woods on the reverse of that check?

A. I wrote it.

Q. And did you negotiate that check? [50]

A. I did.

(Testimony of Dewey Taylor.)

Q. Where did you negotiate it?

A. I negotiated this check—let me see. I don't know where I negotiated this one. It is not marked.

Q. All right. Would you look at the item, Plaintiff's Exhibit No. 2, sir, and would you tell me what that is?

A. The same as the first, Morrison-Knudsen check, or reasonable facsimile of.

Q. Who is it made payable to?

A. James C. Woods.

Q. Number of the check? A. No. 9012.

Q. Would you look at the reverse side of the check, sir. Does any writing appear there?

A. Yes, James C. Woods.

Q. And did you sign that James C. Woods?

A. I did.

Q. Did you negotiate that check?

A. I did.

Q. And where did you negotiate it?

A. Davis Liquor Store.

Mr. Plummer: I call the attention of the court and jury that that is the number of the check mentioned in Count 13 of the indictment.

The Court: 13? [51]

Mr. Plummer: Yes, sir.

The Court: Thank you.

Q. (By Mr. Plummer): Would you look at the object which I have given you which has been marked for identification as Plaintiff's Exhibit No. 3 and tell me what it is, sir?

(Testimony of Dewey Taylor.)

The Court: May I see those as you complete them, please. The first two. Thank you.

A. This is a Morrison-Knudsen check, or reasonable facsimile of.

Q. And would you tell me what number stands on there. A. 8973.

Q. Will you give me that number again?

A. Number 8973.

Q. And who is it made payable to?

A. James C. Woods.

Q. And would you inspect the reverse side of the draft, sir. Do you see a writing on there?

A. Yes, I do.

Q. And what is the writing?

A. James C. Woods.

Q. And did you write that James C. Woods?

A. I did.

Q. And did you negotiate that check?

A. I did.

Q. And whereabouts? [52]

A. Radio-TV Center and Record Shop.

Mr. Plummer: I call the attention of the court and jury that check 8973 is mentioned in Count 14 of the indictment.

The Court: Thank you.

Q. Will you take that which has been marked for identification as Plaintiff's Exhibit No. 4, sir, and tell me what it is, if you know?

A. It is the same as the others, Morrison-Knudsen check, or reasonable facsimile of.

Q. And what number, serial number?

(Testimony of Dewey Taylor.)

A. No. 8977.

Q. The payee, if any?

A. James C. Woods.

Q. Will you look at the reverse side of the check, sir. Is there a writing on there?

A. Yes, there is.

Q. What is written on there?

A. James C. Woods.

Q. And did you write that or do you know who wrote that James C. Woods? A. I wrote it.

Q. And did you negotiate that check?

A. Yes, I did.

Q. And where did you negotiate it, if you know?

A. I am trying to see. Oh, it's City Service. [53]

Q. All right, sir. Would you look at the document which has been identified for——

The Court: Could you help us then, which count that might be?

Mr. Plummer: Yes, I am sorry, your Honor. 8977 is mentioned in Count 15 of the indictment.

The Court: Thank you.

Q. (By Mr. Plummer): Would you look at the object which has been marked for identification as Plaintiff's Exhibit No. 5 and would you tell us what that is, sir?

A. It is a Morrison-Knudsen check or reasonable facsimile of.

Q. And is there a serial number on the check?

A. No. 9065.

Q. And who is it made payable to?

A. James C. Woods.

(Testimony of Dewey Taylor.)

Q. And would you look at the reverse side of the check, sir. Do you see a writing there?

A. Yes, sir, I do.

Q. Do you know who made that writing?

A. I did.

Q. And who did—— A. James C. Woods.

Q. And did you sign the name James C. Woods?

A. I did. [54]

Q. And did you negotiate that check?

A. I did.

Q. And whereabouts, sir?

A. At Leonard's Varieties.

Mr. Plummer: I call to the attention of the court and jury that that is the check mentioned in Count 16 of the indictment.

The Court: Thank you.

Q. Would you look at the object which has been handed you, sir, and marked for identification as Plaintiff's Exhibit No. 6. Will you tell us what it is?

A. It is a Morrison-Knudsen check, or reasonable facsimile of the same.

Q. And would you give us the number of it?

A. Check No. 9051.

Q. And who is the payee, sir?

A. James C. Woods.

Q. Now, would you look at the reverse side of the check, sir. Is there any writing on the reverse side of the check? A. Yes, there is.

Q. And does the name James C. Woods appear there? A. It does.

(Testimony of Dewey Taylor.)

Q. And did you sign that or do you know who signed James C. Woods? A. I signed it.

Q. Did you negotiate that check?

A. I did. [55]

Q. Would you tell us where?

A. Stewart's Photo Shop.

Q. Thank you, sir. Now, will you look at what has been marked for identification only as Plaintiff's Exhibit No. 7. Tell us what it appears to be or what it is?

A. A Morrison-Knudsen check or reasonable facsimile of the same.

Mr. Plummer: Did I, your Honor, tell——

The Court: No.

Mr. Plummer: I am sorry. The last check, 9051, is the check mentioned in Count 17 of the indictment.

The Court: Thank you.

Q. Now, Mr. Taylor, would you tell us if this check that you know of, which has been marked for identification as Plaintiff's Exhibit No. 7, has a serial number on it? A. It does.

Q. Will you tell us what that is?

A. It is not audible.

Q. Pardon me? A. It is not audible.

Q. Not——

The Court: Readable?

A. Yes. I mean I can't——

Q. I wonder if you would read the figures that you are able to read, possibly the first, second and the third one is the one?

(Testimony of Dewey Taylor.)

A. Number 90 blank 6. [56]

Q. Unintelligible 6? A. Unintelligible 6.

Q. Who is it made payable to?

A. James C. Woods.

Q. Now, would you look at the reverse side of that check, sir. Is there writing on there?

A. Yes, there is.

Q. And what is the writing?

A. James C. Woods.

Q. And do you know who signed James C. Woods? A. I did.

Q. And did you negotiate that check, sir?

A. I did.

Q. And could you tell us where you negotiated it? A. Anchorage Liquor Store.

Mr. Plummer: I will advise the court and jury and counsel that this is the check that is mentioned in Count 18 of the indictment.

The Court: Thank you.

Q. Now, at the time you negotiated these checks in the name of James C. Woods you knew or did you know that the checks were false and fictitious?

A. Yes, I did.

Q. Now, Mr. Taylor, you have seven checks there. You have remembered the place that you cashed each of them except the [57] one marked Plaintiff's Exhibit No. 1 A. That is right.

Q. Upon further reflection do you now recall where that was cashed? A. Frontier Loan.

Q. At the Frontier Loan Company?

A. That is right.

(Testimony of Dewey Taylor.)

Q. And for the sake of the Court and jury can you tell us how come or when you first realized that that was true? A. Just now.

Q. Now, were you arraigned down in Commissioner's Court——

Mr. Hepp: I object to the suggestive manner in which the counsel is leading this witness through his answers. I think it should be a direct question. He said he didn't know, I believe he said. Now counsel suggests it might have been when he was arraigned.

Mr. Plummer: I asked him was he arraigned down in Commissioner's Court. There is nothing suggestive about that. I could ask that same thing of every defendant sitting here in the court room.

The Court: Well, of course, the Court will sustain the objection to a leading question and/or suggestive question, but this does not appear to be, therefore, the objection is overruled. You may proceed. [58]

Q. (By Mr. Plummer): Were you arraigned down in Commissioner's Court? A. I was.

Q. Were you eventually released on bond, sir?

A. I was.

Q. And do you know who put up your bond?

Mr. Hepp: I object to that. I don't see that that is relevant and pertinent to the issues before this Court.

The Court: What is the materiality, counsel?

Mr. Plummer: I was going to show——

Mr. Hepp: We believe any——

Mr. Plummer: Might we approach the bench?

(Testimony of Dewey Taylor.)

The Court: Yes.

(Whereupon, all counsel approached the bench and the following proceedings were had out of the hearing of the jury:)

Mr. Plummer: I was going to show, as is obvious from the check, that there is no banking place and to refresh the witness' recollection. As a matter of fact, the first time he became aware that this was the particular check cashed down at the Frontier Loan Company was when he was released on bond. A fellow by the name of Waters came up and made bond for him and Mr. Waters, of course, runs the Frontier Loan Company, and, of course, when he saw the party making bond he had seen him. I don't know who arranged the bond, perhaps Mr. Kay or Mr. Gore, somebody who is representing him in his behalf at that time did it, but it is not [59] greatly material. I don't think it is harmful in any way. I don't see how the defendants or any of them could be prejudiced by bringing that out.

Mr. Nesbett: Why he remembered it at a later time where he negotiated that one check. You don't intend to follow it as a precedent with respect to every defendant as to who made bond?

Mr. Plummer: No. We have 67 checks. The first time through he didn't remember and the second time through he did remember.

Mr. Hepp: I am willing to stipulate for the defendant Wright that the witness can answer that

(Testimony of Dewey Taylor.)

summarily that he has now remembered where he cashed that and leave the bonding issue out.

The Court: Very well.

(Whereupon, all counsel resumed their respective seats and the following proceedings were had in the presence of the court and jury:)

The Court: I understood based upon the prior stipulation where one counsel entered into a stipulation that all other counsel likewise entered into the same stipulation unless there is an exception.

Mr. Hepp: That is satisfactory with me unless there is an exception. I think each counsel has a right to lodge an objection.

Mr. Kay: I didn't hear the particular objection. [60]

The Court: The point is simply this, if you recall Attorney Hepp entered into a stipulation. Now, there is no comment by Mr. Nesbett or yourself and I would conclude, based upon our prior agreement, that since you didn't take any exception to his proposed stipulation that you concur therein.

Mr. Hepp: I will inform Mr. Kay.

Mr. Kay: I didn't hear the stipulation, your Honor, because I wasn't particularly concerned with the question. I will ask Mr. Hepp what the stipulation was.

The Court: You may do so.

Mr. Nesbett: As to this stipulation, your Honor, I agree I would be bound by it.

(Testimony of Dewey Taylor.)

The Court: Well, counsel, I think that is no more than fair——

Mr. Kay: I have no objection.

The Court (Continuing): ——to require of you the same courtesy you are asking of the Court.

Mr. Kay: I most certainly will.

The Court: Mr. Nesbett, I would like to have it understood now that if one of counsel offer or propose to stipulation that unless you take exception that it will be assumed that you have no exception to the stipulation.

Mr. Kay: Right.

The Court: The same as you want an objection even though you don't take an objection. [61]

Mr. Nesbett: Very well.

The Court: Very well. You may proceed.

Mr. Plummer: Would the Court now tell the jury what the stipulation was.

The Court: As I recall the stipulation was to the effect that—I have forgotten just who the party was to be honest with you. Counsel stated—I wasn't concerned who the party was but I was as to the question of law leading up to that point. Mr. Hepp, would you please proceed.

Mr. Hepp: My statement would be that the substance of the stipulation is that this witness may state that he now recalls where he negotiated the particular identification, I have forgotten its number.

Mr. Plummer: Number 1.

(Testimony of Dewey Taylor.)

The Court: But who was it? That was the thing I didn't get.

Mr. Hepp: Sir?

The Court: He now recalls why he negotiated it, but where did he negotiate it?

Mr. Hepp: He may state that now. That was the stipulation.

The Court: I see. Thank you. You may proceed.

Mr. Plummer: May I approach the witness, your Honor?

The Court: You may do so. [62]

Q. (By Mr. Plummer): Would you now tell us again where you negotiated Plaintiff's Exhibit No. 1?

A. I don't see how I forgot it in the first place because ironically they went my bond, Frontier Loan.

Q. Would you just tell us——

A. Frontier Loan.

Q. (Continuing): ——where you did it?

A. Frontier Loan.

Mr. Plummer: I now offer Plaintiff's Exhibits for identification only 1, 2, 3, 4, 5, 6 and 7 in evidence.

The Court: Is there any objection?

Mr. Kay: I simply enter the objection there has been no foundation laid yet as to whether or not these checks are genuine Morrison-Knudsen checks or, as the witness so often said, reasonable facsimile of.

The Court: I think you are entitled to know

(Testimony of Dewey Taylor.)

that. Mr. Plummer, would you inquire of this witness.

Mr. Plummer: I inquired of this witness and I am sure the record will bear me out.

The Court: I know, but will you just ask specifically, are these Morrison-Knudsen checks.

Q. (By Mr. Plummer): Are these actually true and genuine Morrison-Knudsen checks?

Mr. Kay: Object to that. This witness couldn't possibly know. [63]

The Court: Well, if he knows he may answer. Objection overruled.

Mr. Kay: How could he know?

The Court: I don't know. Anybody can testify as to what they know.

Mr. Nesbett: Your Honor, I'd like to join in that objection. I don't think he is competent to answer. No foundation has been laid to know whether or not they were Morrison-Knudsen checks, therefore, the witness might make a damaging conclusion based upon ignorance or a desire to assist the United States Attorney and I object at this time.

Mr. Plummer: I object to the last remark and ask that the jury be instructed to disregard it.

The Court: Let's take one point at a time. Now, Mr. Kay objected to the admissibility of these documents because there was nothing in the record as to whether or not these were genuine Morrison-Knudsen checks. In accordance with his request I asked counsel for the Government to ask this witness whether or not he knew and now counsel come along

(Testimony of Dewey Taylor.)

and object to the very thing that they have requested. Objection overruled. You may answer if you know. If you know, now don't guess.

Mr. Nesbett: May I be heard on my objection?

The Court: You have already been heard, counsel. Do you have something to add?

Mr. Nesbett: It isn't necessarily required, your Honor, [64] that Mr. Plummer qualify these identification exhibits for admission into evidence by this witness. The point we are making is that he hasn't supplied all the information concerning them that would make them admissible. To try and get it out of this witness when he is not competent to answer the question would be forcing the witness to possibly say something that he would not otherwise say.

Mr. Plummer: I will be glad to rely on the record, your Honor. If you recall, after the last No. 7 was marked for identification and he said he had negotiated all of them I asked the witness if he knew at the time he negotiated the documents, the seven items, if they were false and forged and he said yes.

The Court: Yes.

Mr. Plummer: That is all the foundation needed.

Mr. Hepp: May it please the court, knowing they are false and forged certainly doesn't equip this witness with the knowledge as to whether they were genuine M-K checks. I see no relation.

The Court: The point of it though is that co-counsel is the one that made the objection.

(Testimony of Dewey Taylor.)

Mr. Hepp: I would like to join in the objection myself, as no foundation has been laid, calls for a mere opinion of this witness, and I fail to see his qualification.

Mr. Nesbett: Only so far, your Honor, is the signature [65] of James C. Woods is what I thought Mr. Plummer had in mind. He could, of course, testify to that.

The Court: But let's go back now. Mr. Kay was the one that requested that the court grant him an objection to the admissibility of these documents because they had not proven to be this, that or the other.

Mr. Kay: That is right, your Honor. What I am saying is this witness is qualified to testify as to his signature on them, but as to that other question he is not qualified and he has already testified where he got them.

The Court: Well——

Mr. Plummer: He is qualified to testify——

The Court: Pardon me. The only thing before the Court is admissibility or inadmissibility of these exhibits. Based upon the record and evidence before the Court the objection is overruled and they may be admitted and marked Plaintiff's Exhibits 1 through 7, inclusive.

Mr. Plummer: May I have just a minute, your Honor?

The Court: You may.

Mr. Plummer: I have no further questions, your Honor.

The Court: Now, could we have an understanding of what will be the order of cross-examination, counsel?

Mr. Hepp: I intend to examine the witness for defendant Raymond Wright.

The Court: First? That is the point. [66]

Mr. Hepp: I am willing to proceed first.

The Court: Well, supposing you discuss it with other counsel so you might have an understanding and meeting of the minds. I haven't any preference myself.

Mr. Kay: It doesn't make any difference. If the Court cares to take a recess we could discuss it during the recess.

The Court: Would you care to do so? Is that your pleasure?

Mr. Hepp: Yes, your Honor.

The Court: Very well. Court will go into recess for a period of 10 minutes.

(Whereupon, at 11:15 o'clock a.m., following a 10-minute recess, court reconvened and the following proceedings were had:)

The Court: Let the record show all the jurors are back and present in the box. The bailiff has called to my attention the fact that one of the witnesses was in the court room this morning. Now, as I told counsel before, I do not know the names of the witnesses myself, therefore, I will have to look to counsel to see that the witnesses are excluded, under the rule. May I inquire again of counsel, of anybody present whether or not there are any wit-

nesses who have been subpoenaed or who have come to testify in this trial?

Mr. Plummer: Are there any witness here that have been subpoenaed by the Government? [67]

The Court: What is that gentleman's name, Mr. Plummer?

Mr. Plummer: Can you give me your name?

Mr. Judd: Clifford Judd.

The Court: Clifford Judd.

Mr. Kay: I note that that man—I didn't know that he was a witness—has been in the court room all the preceding hour.

Mr. Plummer: I didn't know the gentleman and I don't know him. I have seen him but I didn't recognize him as being a witness.

The Court: There was also a colored person, so the bailiff told me, and I don't know who he is, nor what his name is, but he left prior hereto. Well, as you can see, counsel——

Mr. Kay: None of the witnesses I am going to call have been here. I know because I have watched for them, but I can't watch for the Government witnesses because I don't know who they are.

The Court: I appreciate that, but we will have to be cautious and careful. As I said, I don't know either the defense witnesses nor the Government witnesses. I will have to look to counsel for that assistance.

Mr. Plummer: If the Court will bear with me when we start at each hour I will inquire to make sure.

The Court: Very well. You may proceed then.

DEWEY TAYLOR

testifies as follows on

Cross-Examination

By Mr. Hepp:

Q. How old are you, Mr. Taylor?

The Court: Excuse me. You were going to advise the Court how you were going to cross-examine so we will have some order to our proceedings. I take it you are going to be first, Mr. Hepp.

Mr. Hepp: Yes.

The Court: And who is next?

Mr. Kay: I have not yet decided whether or not to cross-examine this witness at all.

The Court: But any witness so we will have some routine.

Mr. Kay: It may be that the next witness I will want to cross-examine him first. I don't see any difference as long as we don't delay the trial, as long as we proceed expeditiously. We may want to vary from witness to witness.

The Court: I haven't any objection to that excepting this, I have had a number of trials where we had lots of counsel and we have always entered into some kind of agreement. Now, we can always vary that to meet the wishes of counsel.

Mr. Hepp: I submit to the Court that in many joint trials the defense have interests in common. In this particular trial there may be very antagonistic interests and I certainly want to be regarded as independent of the other counsel. I am sure [69] this must be puzzling to the jury because we neces-

(Testimony of Dewey Taylor.)

sarily must confer about certain matters because there are some things that are common to all parties, but we desire to remain singularly, at least I do.

The Court: Of course, you can remain singularly and still have some pattern.

Mr. Hepp: If we can agree.

The Court: If you can't we can do the next best, but I'd like to have an understanding generally with leave of counsel to appeal to the Court to the change, if you haven't any objection.

Mr. Hepp: My view would be that the witness who may appear more in point of one witness than the other, certainly, would entitle the attorney for that defendant to voice an opinion if he so desires of an opportunity of first examination.

The Court: I concede that but generally——

Mr. Hepp: Vary witness to witness accordingly.

The Court: But I still feel I am not asking anything unusual or out of the ordinary to have an understanding with counsel as to which is to go first.

Mr. Kay: Any order is agreeable with the understanding it can be varied.

The Court: Mr. Hepp first. Who is next?

Mr. Kay: I will go second.

The Court: All right. Mr. Kay then Mr. Nesbett. You may proceed then. [70]

Q. (By Mr. Hepp): I believe I asked you, sir, how old you were? A. I am 37 years old.

Q. Are you married? A. No, not now.

Q. Have you been married? A. I have.

Q. Have you raised a family? A. I have.

(Testimony of Dewey Taylor.)

Q. Where have you spent the principal portion of your life?

A. Musician, entertainer. I have traveled all over the world. I have traveled since I was old enough. No certain place.

Q. How long have you been in the Territory of Alaska?

A. Since the latter part of—first part of '55.

Q. Where has that residence been? Has that been throughout the Territory or——

A. Fairbanks—Anchorage and Fairbanks.

Q. Could you give us some idea of the break in time during your period of stay up here, the time you spent in Anchorage and in Fairbanks?

A. When I first came to Alaska I was here about three weeks then I went to Fairbanks and I stayed for about a year and nine months, pretty close to two years.

Q. And that would bring you up to what date, sir?

A. Up until the time I left to go Outside. [71]

Q. And what was that date again?

A. That was September 4.

Q. That would be immediately following this incident that you have been referring to?

A. That is right.

Q. I believe you stated that you knew the defendant Raymond Wright? A. I do.

Q. How long have you known Mr. Wright?

A. I have known Mr. Wright ever since he first came back to Anchorage in September.

(Testimony of Dewey Taylor.)

Q. Has that been a social or a business acquaintance or both?

A. He was once my employer.

Q. You were working in the capacity as musician?

A. I worked in the capacity of bartender and musician for him.

Q. And would you state again how long that employment was?

A. Up until I left—when I first met him in September of '55 until September of '56, a year approximately.

Q. Could I conclude that you got along pretty good with Mr. Wright, being his employee all that time? A. I did.

Q. In fact, socially you were quite good friends, weren't you? A. We had our ups and downs.

Q. As many people do?

A. That is right. [72]

Q. Nothing particularly unusual about that with your acquaintances with other people and friendships, is that right? A. That is right.

Q. I believe you stated that you had pleaded guilty to a charge here in this Court.

Mr. Plummer: It is immaterial on this point, but I think the question as phrased is improper. The question asked on cross-examination should be "did you testify, did you say this or that." It should be a question and not, of course, an affirmative——

The Court: Objection sustained.

Q. (By Mr. Hepp): Did you testify here that

(Testimony of Dewey Taylor.)

you pleaded guilty? A. I did.

Q. And that was to the counts contained in the indictment as is before this Court at this point?

A. I did.

Q. Have you been sentenced for that on that plea? A. No, I haven't.

Q. In the course of this matter and following your arrest and—incidentally, may I ask when you were arrested in connection with the indictment that is presently before the court?

A. I was first apprehended in Vancouver, B. C., British Columbia, and I was brought back to Seattle and brought up here. I got up here February 25, so this must have been around the 19th or 20th of February. [73]

Q. And you were in custody here in Anchorage, were you, following that arrest? A. I was.

Q. In fact——

The Court: Pardon me. I am confused, counsel. It is only the 20th day of February now. What year is that?

The Witness: Last year.

Mr. Hepp: I thought that he was referring to last year, a year ago.

Q. If you would be good enough to state, sir, from the witness stand what year it was?

The Court: You see, that wouldn't add up. If I am not mistaken these checks were just passed last August.

Mr. Kay: '56.

(Testimony of Dewey Taylor.)

Mr. Plummer: The checks were passed over the Labor Day holiday in 1956, your Honor.

The Court: Oh, in '56. I stand corrected. Thank you.

Q. (By Mr. Hepp): What year is this February date that you have given us? A. 1957.

Q. In the course of during your custody, constructive or otherwise, by that I mean either out or in without bail, you engaged an attorney to represent you in this matter, did you not?

A. No, I did not. [74]

Q. Did you ever engage Mr. Wendell Kay to represent you? A. No, I did not.

Q. Did you ever have any discussions with Mr. Kay in connection with your problems and difficulties arising out of this arrest on this indictment?

A. At first I did.

Q. Well, did you go to him and talk to him in his capacity as an attorney or was it for some other reason? A. I didn't talk——

Mr. Plummer: Object to the question as being immaterial.

Mr. Hepp: I believe he stated he hadn't engaged an attorney but that he talked with one. I was trying to determine the difference.

Mr. Plummer: I think both questions are immaterial.

The Court: Objection overruled. He may answer the question.

A. I went and got in touch with Mr. Kay. I was

(Testimony of Dewey Taylor.)

talking with Mr. Kay. I never engaged him as an attorney because I never had the money.

Q. Well, did you consider him as your counsel at least until the fact developed that you desired not to pay him some money, or whatever this reason is that you started to say?

A. We never talked along those lines.

Q. Along what lines?

A. Along the lines of him being my attorney and I his client. [75]

Q. Well now, isn't it a fact that sometime considerably later you again approached Mr. Kay and said, "I don't need your services any more. I have made a deal with the D.A."? A. I did not.

Q. You deny making that statement to him?

A. I deny making that statement. I said I didn't need an attorney. I had already pleaded guilty.

Q. Have you made a deal with the District Attorney? A. No, I have not.

Q. Have you discussed with him your answers and questions, the questions that are going to be put to you in this trial?

A. How do you mean have I discussed it with him?

Q. Just what the word means. Have you discussed with the District Attorney or any of his staff the questions and answers that were going to be brought out in this trial?

A. All I have discussed with the District Attorney as far as this trial is my statement.

Q. That is all? A. That is all.

(Testimony of Dewey Taylor.)

Q. Let's see, Mr. Taylor——

A. That is the statement I signed.

Q. How many statements have you signed since you have been arrested? A. One.

Q. When did you sign that? [76]

A. I signed that in front of Commissioner Daines, United States Commisisoner Daines.

Q. When? A. Last year.

Q. Where is Commissioner Daines? I mean, where, geographical location?

A. U. S. Commissioner's office in the Federal Building.

Q. Here in Anchorage?

A. In Anchorage.

Q. And all you have discussed was this statement with the District Attorney?

A. That is all.

Q. Mr. Taylor, where were you from approximately 8:00 o'clock until after 11:00 o'clock last night? A. Where was I?

Q. Yes, where were you?

A. Do I have to answer that?

The Court: Well, you do.

A. Well, I refuse to answer that.

Q. On what grounds? That it may incriminate you? A. That is right.

Q. I fail to see any incrimination as to stating where you were unless you were committing a crime.

A. Well, I refuse to answer that.

Q. I insist that you answer it, sir. [77]

A. Do I have to answer that?

(Testimony of Dewey Taylor.)

The Court: If it would in some way incriminate you then, of course, you need not answer the question, but if it does not then you must answer it, yes.

Mr. Plummer: May I advise Mr. Taylor that he has no basis at all for refusing to answer that question. He should tell them where he was.

A. I was in jail under protective custody.

Q. (By Mr. Hepp): Were you in the usual place in jail where you have been or were you in a special place under protective custody last night between 8:00 and 11:00?

A. Between 8:00 and 11:00?

Q. Or thereabouts, yes, or any time during last evening? Mr. Taylor, will you state yes or no were you in the District Attorney's office, the United States Attorney's office last night after trial?

A. Yes, I was.

Q. And were you not there the night before until approximately 11:00 o'clock or later?

A. Yes, I was.

Q. And you spent these two nights discussing the statement that you had made and nothing else?

A. That is right.

Q. How long is that statement? [78]

A. Don't you have a copy?

Q. I asked you a question, sir.

A. Well, if you have a copy you should know.

Q. Just answer the question, please.

A. I have.

Q. How long is it, two, three, four, five pages, one half of a page?

(Testimony of Dewey Taylor.)

A. Oh—could I have a copy of it?

Q. I object. Just answer the question. I am asking you how long it is? You made it out. You ought to know. A. I didn't count the pages.

Q. Would you give us an estimate, please? More than three pages? A. Yes, it is.

Q. More than four? A. I think so.

Q. Would you state whether or not in this statement that you made this year ago, I believe that is when it was, or more, did you mention the defendant Raymond Wright's name in that?

A. Yes, I did.

Q. In the same sense that you discussed it in your testimony yesterday, sir?

A. The same, except for one part.

Q. You know, of course, that it is within my power to obtain a copy of that statement? [79]

A. I have no objection. I said excepting for one part.

Q. You mean that part that Mr. Wright didn't know what was going on?

A. No, the part where Mr. Wright threatened my life.

Q. Well, I had understood that just occurred here the last few days?

A. That is right. That is in my statement.

Q. That is in your statement?

A. No, it is not in my statement, but it should be. I added it yesterday.

Q. How could it be if you made it a year ago?

A. I added it yesterday.

(Testimony of Dewey Taylor.)

Q. Have you ever been in trouble before, Mr. Taylor? A. No, I haven't.

Q. But you regard yourself in serious trouble now? A. I think so.

Q. Where did you first learn the word, phrase "reasonable facsimile?" What does that mean, incidentally?

A. Do I have to answer that?

A. Yes, you do.

A. Well, I have heard it used.

Q. By the District Attorney or one of his staff?

A. No.

Q. Before?

A. I have had a little education myself. [80]

Q. Well then, just tell us what it means?

A. It means it is either the same or something very close to it.

Q. That sounds right. Where did you first run into the phrase, "false and forged?"

A. On my warrant for arrest.

Q. What does the word "forgery" mean, sir?

A. I imagine it means signing a name that isn't yours or signing a check or something that is not yours, or that you have no legal right to sign.

Q. When you say something is forged, then you are just saying, according to your definition, that is something you have signed or somebody signed that they shouldn't have?

A. It means signing someone else's name, doesn't it?

Q. Well, without their permission?

(Testimony of Dewey Taylor.)

A. That is right.

Mr. Plummer: I am going to object to further inquiry along this line. I don't think it adds to anything and I don't think that the witness should be required to give a legal definition or——

Mr. Hepp: He is presumed to answer the question. We have a right to know and the jury has a right to know what he means by his statement. He used the word. I think he should be able to define it.

Mr. Plummer: He has answered the question. I object to further pursuing the matter. [81]

The Court: There is nothing before the Court in fact at this time since a further question hasn't been asked, therefore, let's proceed.

Q. (By Mr. Hepp): What was the name that you signed to these checks?

A. James C. Woods.

Q. Do you know a James C. Woods?

A. No, I don't.

Q. Well, if it were to be developed here that forgery is actually the writing of some other person's name without his permission, well then, how can you cay you forged these checks if there is no James Woods?

Mr. Plummer: I object to that question as calling for a legal conclusion.

The Court: Objection sustained.

Q. (By Mr. Hepp): You stated that you hadn't made a deal with the District Attorney?

A. I did.

Mr. Plummer: I object to further questions

(Testimony of Dewey Taylor.)

along that line on the ground it is repetitious. It has been asked and answered twice. I am going to object.

The Court: I assumed it was a preliminary question. The objection will be overruled with that understanding. [82]

Q. (By Mr. Hepp): Am I to gather then that no promises have been made to you in connection with this then in exchange for your testimony?

A. They have not.

Q. Just only hope that it will be recognized?

A. That is correct.

Q. You are well acquainted with the considerations that are sometimes given in exchange for testimony, are you? You do have hopes in this case?

A. I do have hopes, yes, but I am not acquainted with anything. I have never been in anything before. I am not a habitual criminal.

Q. Well, I hope there was nothing in any of my questions that inferred that you were.

A. You talked as if I was used to this procedure.

Q. I did? What did I say in that regard?

A. I don't know. You know what you said.

Q. Actually, Mr. Taylor, you would be real happy to trade a year or two of your life for a year or two of one of these defendants——

Mr. Plummer: Object to these questions.

The Court: Objection sustained.

Q. (By Mr. Hepp): Isn't it a fact, Mr. Taylor,

(Testimony of Dewey Taylor.)

that you were on real good friendly terms with the defendant Wright until this altercation, this fracas, this incident that occurred out [83] at the Oasis when you became gravely imbittered against him and went right down to the District Attorney's office and made a statment that was completely contrary to everything that you had said before?

A. That is an untruth.

Q. I believe you stated that following that incident that you did go right down and ask for custody, is that right?

A. No, I didn't state that.

Q. Well, did you in fact go down to the District Attorney's office or one of his staff or other law officer? A. No, I called the Marshal.

Q. And you and Mr. Wright parted company right that moment?

A. Me and Mr. Wright—Mr. Wright and I were never in company.

Q. Oh. You stated that for over a year you worked for him and you were on very good terms?

A. You didn't say that. You were saying one thing and you jump from one week back to last year, a year or so ago. I mean, if you make it definite I will do my best to give you an answer.

Q. When did you part this friendly relationship with Mr. Wright then that you testified did exist during the period of your employment, with your ups and downs, of course?

A. Well, after I layed in jail 79 days.

Q. You got mad at him for that?

(Testimony of Dewey Taylor.)

A. No. [84]

Q. Then that isn't when you parted company?

A. I parted company with everybody when I layed in jail for 79 days.

Q. You were imbittered against the world, you mean?

A. I didn't say anything against the world.

Q. You said you parted company with everybody. What did you mean by that?

A. After laying in jail for 79 days I didn't have any special love for anybody in or out of the world.

Q. I will ask you one more time, Mr. Taylor, and you are under oath. Do you deny having told Mr. Wendell Kay, in substance, "I don't need your services any more. I have made a deal with the District Attorney." Do you deny that?

A. I deny that, part of it.

Q. What part?

A. I told him I didn't need his services as an attorney as I had already pleaded guilty.

Q. When did you plead guilty?

A. I pleaded guilty last year.

Q. And it was after you had pleaded guilty that you told him this or before, Mr. Kay?

A. I couldn't have told him before because I was in jail.

Q. I believe he has occasion to go over to the jail and talk with people.

A. I never had occasion to talk to Mr. Kay when I was in jail. [85]

(Testimony of Dewey Taylor.)

Q. Do you remember when you told him, whether you were in or out of jail?

A. I was out of jail.

Q. That was after you had pleaded guilty?

A. It was.

Q. Well, would you state to me just when you did plead guilty? A. When I signed——

Mr. Plummer: If he knows.

Mr. Hepp: I am confused. I really am confused.

Mr. Plummer: May I aproach the witness and give the witness the court file so he can check the date?

Mr. Hepp: I withdraw the question and ask for an approximation, whether it was spring, fall, or the winter months of a given year. He certainly could remember that, I believe, or state whether he can or not.

A. It was the fall of the year.

Q. Of what year? A. This year.

Q. Fall of this year? A. Yes.

Q. You must mean 1957. The fall of this year hasn't occurred yet.

A. Wait a minute. I couldn't plead—I had to plead guilty before a judge. That was this year, fall of this year. [86]

Q. Do you mean, if I may suggest, the fall of 1957, the fall that has just passed?

A. This fall.

Q. Well, this fall, sir—this is 1958 and fall doesn't occur until next August.

A. This past fall.

(Testimony of Dewey Taylor.)

Q. That would be 1957?

A. '57, yes, that is right.

Q. I was going to say I wish somebody would explain it to me. I can't quite follow. It would be 1957? A. That is right.

Q. That was a year after the incident occurred, is that right, after the acts which took place that you have testified to in connection with this?

A. Yes.

Q. About a year?

A. Yes. I had the two confused, the signing of my statement and when I pleaded guilty. I had the two confused. That is what I was referring to when I said I had pleaded guilty before. When I signed my statement, that is when I thought I had pleaded guilty, but I didn't plead guilty until I went before the judge.

Q. And that was last fall?

A. That is right.

Q. Was that before or after you told Mr. Kay in connection with [87] what we have discussed?

A. That was before I told him that.

Q. You mean you pleaded guilty, then went out on the streets after that?

A. I have been out on the street ever since I pleaded guilty.

Q. You have never been sentenced and you have had a guilty plea in this court for some six months or five months? A. No.

Mr. Plummer: Object to the question.

Mr. Hepp: I am trying to understand this.

(Testimony of Dewey Taylor.)

Mr. Plummer: If you want to understand it look at the court file. You will find all the facts, date of plea in there, whether or not he has been sentenced in the court file.

Mr. Hepp: We have relied on this witness' memory on everything else; I think we ought to be entitled to rely on it now. If he can't remember this how can he answer anything else?

Mr. Plummer: He answered the question.

Mr. Hepp: Then what are you objecting to?

Mr. Plummer: To the inference you are attempting to draw.

Mr. Hepp: I am not aware of that.

The Court: Let's not have any repartee. Let's proceed.

Mr. Plummer: I am sorry.

Mr. Hepp: I am sorry. May I have a moment, your Honor?

The Court: Yes, you may. To keep the record straight, [88] do counsel feel that the Court should rule on this repartee? I got lost in it.

Mr. Hepp: I will withdraw any objection. I am not sure what the point was.

Mr. Plummer: I will certainly withdraw anything I had and I will apologize to counsel and to the Court.

The Court: Thank you.

Mr. Hepp: At this time, your Honor, I would like to formally make a demand upon the United States Attorney to produce the statement or a copy of it.

(Testimony of Dewey Taylor.)

The Court: Very well. Motion is granted. You may hand the statement to counsel.

Mr. Hepp: May we have a few moments to examine it?

The Court: Why don't we do this, counsel: We could recess at this time.

Mr. Plummer: I would request, your Honor, that the inspection be made in the presence of one of the Court's officers, then returned to the Court's officer, one of the Court's officers, that is, I have no objection whatsoever to giving them the statement and have it ready to give to them at this time, but if an inspection is made I want the bailiff or somebody to be here.

Mr. Hepp: I rather resent the inference there. I believe myself to be an officer and attache of this Court and can be entrusted for the safe keeping and return of an instrument.

Mr. Plummer: I renew my request, your Honor, and I—— [89]

Mr. Hepp: I add to my request, all the statements that have been made by this witness to the District Attorney or any of his staff.

The Court: Very well.

Mr. Hepp: Or in the Marshal's office or kindred offices under his control.

The Court: Mr. Plummer, at this time then the Court directs you to hand over to Mr. Hepp the statements and all the statements made by this witness to you and/or anybody in your office.

Mr. Plummer: This does not include the work

(Testimony of Dewey Taylor.)

preparation of the United States Attorney for the trial.

The Court: Yes. Well, there has been no demand for that.

Mr. Plummer: May I approach the witness and give him a copy of the statement if there is going to be interrogation?

Mr. Hepp: I don't believe that is covered within the scope of the rule that allows a counsel to be assisted or not in statements that are made previously.

The Court: On the other hand though——

Mr. Hepp: I am quite sure I can site the authority.

The Court: Under the rule, counsel, if this witness is to be examined about a statement that he has made and signed he is entitled to see it before the examination.

Mr. Hepp: I believe that is right, your Honor, but I [90] haven't made any examination concerning this statement and I believe that the objection is, therefore, premature.

The Court: Then if you do examine this witness it is understood that a copy of this will be accorded to him and he will have a chance to read it before we proceed.

Mr. Plummer: That is all I wanted.

The Court: That will be the order.

Mr. Hepp: We would like a few moments.

The Court: Do you want to recess at this time?

Mr. Hepp: It is very nearly noon, your Honor.

The Court: I think probably the ends of justice would best be served through this proceeding. Now, getting back to this other request. I am in the unfortunate position, since counsel for the Government has requested that this be considered in the presence of someone, I suppose I am bound by that request the same as if the converse were true.

Mr. Hepp: May I state that if counsel values the original that if he will give me a copy with his oral certification that it is a true and correct copy I am willing to trust him in that regard.

The Court: Very well. That being the case then would you hand the original back to Mr. Plummer and he will supply you forthwith—I presume it is a signed copy, Mr. Plummer?

Mr. Plummer: This is an unsigned copy.

Mr. Hepp: I have no objection to the signature if he [91] will certify it is a true and correct copy of this original.

Mr. Plummer: As a matter of fact, your Honor, there may be corrections made on the original that are not made on the copy.

The Court: Could you ascertain that fact?

Mr. Plummer: I am sure there are. I did not mean that they had to be surveilled or anything like that. I certainly didn't mean to convey that impression except I didn't want them to take an hour or two in the office and hash it over there. If they are going to examine it they should examine it in the Clerk's office or some place like in the custody of the Court.

Mr. Kay: There isn't any such provision in the statute. The statute simply says the United States, when ordered by the judge, will hand it over. It doesn't say surveillance required by detectives or marshals or anybody else.

Mr. Plummer: It is contemplated in the statute the inspection will be made in the presence of the Court during the course of the trial prior to cross-examination and after the direct examination has been concluded.

The Court: I think that is right, Mr. Kay.

Mr. Kay: It simply says, "Whenever any statement is delivered to a defendant pursuant to this section, the Court in its discretion, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its [92] use in the trial." I am quoting from the statute.

The Court: I understand that. Now, may I see that, please?

Mr. Kay: Yes, sir.

Mr. Hepp: I might add it is not entirely clear to me why it would be objectionable whether I studied the statement here or out in the street or in my office.

The Court: If you will recall, counsel, there were a number of decisions on this matter prior to the time the law was passed.

Mr. Kay: The Jincks opinion, sir.

The Court: Yes. As I recall there were certain limitations in the Jincks opinion.

Mr. Kay: I don't remember any. I was one of the first to avail myself of it.

The Court: I am relying upon memory only and I could be in error.

Mr. Plummer: I have absolutely no objection then to their looking at it as long as they want to except I think it should be in the custody of the Court because it is on the Court's order that it go to them.

The Court: Well, of course, the Court would be responsible for that and I am not impugning, counsel, in any way, shape or form, but what could happen is that it could be surreptitiously withdrawn from counsel without counsel participating in any way, [93] shape or form. It would appear this would be similar to any other exhibit that may be offered in evidence and that is that it should be under the constructive custody all the time of the Clerk of the Court and I think this is no exception.

Mr. Kay: Of course, this is not an exhibit. It is a part of the material in the possession of the United States Attorney and merely offered to us for inspection to determine whether there is any use to be made of it at all, read it and toss it back.

Mr. Hepp: We don't believe it would be admissible on the application of either party.

The Court: I understand that, but getting back to my point and that is that all things of this nature are ordinarily considered to be under the custody of the in-court deputy.

Mr. Kay: As far as I am concerned, well, I am not concerned with it. I don't really care. I was

going to say I was concerned. I would sit here and read it.

Mr. Hepp: If Mr. Plummer would designate some court officer I will withdraw my objection and stay here and study it.

The Court: All right. Mr. Bailiff, then the Court instructs you to remain then and then take it back to Mr. Plummer. Give Mr. Hepp all the time he needs to consider the document.

Mr. Hepp: Thank you.

The Court: Very well. Then for the reasons stated, it is now—based upon our consumption of time for this [94] determination—seven minutes to 12:00. I think probably we best recess for our lunch at this time, therefore, without objection the trial of this case will be continued until this afternoon at the hour of 2:00 p.m.

Again I must instruct you, as you know, under the law you are not to discuss this case among yourselves nor are you permitted to let others discuss it with you.

This court will now go into recess until 1:30.

(Whereupon, at 11:55 o'clock a.m., the Court continued the cause to 2:00 o'clock p.m. of the same day.)

(At 2:00 o'clock p.m., all counsel being present, the trial of said cause was resumed:)

The Court: Will counsel stipulate all the jurors are back and present in the box?

Mr. Plummer: Yes, your Honor.

Mr. Kay: Yes, your Honor.

Mr. Hepp: We so stipulate.

The Court: Mr. Plummer.

Mr. Plummer: Your Honor, I would like to take the time of the Court to inquire if there are any witnesses under Government subpoena now in the courtroom? (No response.)

I then have another matter I'd like to take up with the Court. I was advised over the noon hour, in fact on the way over to my [95] office, that we have two statements from this witness. I just produced one statement to defense counsel prior to lunch time because I thought that was all we had. I have found out we have two and I would like at this time to give the other statement to defense counsel for their inspection.

The Court: Very well, and the court will remain in informal recess while counsel have an opportunity to read this. The jurors may visit and so may the people in the courtroom.

Mr. Plummer: May I take this opportunity to approach the witness and make available to him the copy, if in fact he is cross-examined?

Mr. Hepp: I object to that until there is some cross-examination.

The Court: Yes, I think counsel for the defense is correct.

Mr. Hepp: I believe Mr. Plummer missed the point. We are asking our right to—in preparing our case to inspect these. I don't think the matter goes any further or there is any inferences or implications than that. It is a normal procedure.

The Court: That is true.

(Following a short informal recess, the Court resumed formal session and the following proceedings were had:)

The Court: Mr. Hepp.
Mr. Hepp: We are ready to proceed. [96]
The Court: Very well.

DEWEY TAYLOR

resumes the witness stand and testifies as follows on

Cross-Examination
(Continuing)

By Mr. Hepp:

Q. Mr. Taylor, you stated during your direct examination that you had a given amount of money. I fail to recall how much that was. I believe you testified the total amount of money that you had come by by virtue of your having cashed these checks. Can you now state what your testimony was?

Mr. Kay: I object to that question, your Honor. I renew the same objection that I made to it when the United States Attorney asked a similar question, that is, that the given amount of money obviously involved an attempt to prove other crimes other than those set forth in the indictment.

The Court: Objection overruled. He may answer that question. Now, I am not ruling upon your objection as to the fact we are not trying anything else but what is in the indictment, but I think it is

(Testimony of Dewey Taylor.)

proper cross-examination where counsel for the defense has inadvertently forgotten the amount so testified to.

Mr. Kay: I objected to it at the time.

The Court: Yes, and as I recall the objection was overruled.

Mr. Kay: No, the objection, your Honor—what I did, [97] I neglected to object at the time that question was asked, then I objected when he was asked another question a few minutes later and the objection was sustained.

Mr. Hepp: May it please the Court, I believe that the information is not too important if it offends Mr. Kay.

Mr. Kay: It offends me highly.

The Court: Very well. You may proceed, there is nothing before the Court.

Mr. Hepp: I had several other questions along that line. I will withdraw those. That ends my examination.

The Court: Now, Mr. Kay, you may examine.

Mr. Kay: May I have just a moment.

Mr. Hepp: May it please the Court, I intend to object to any cross-examination of this witness by any of the other defendants except insofar as matters which tend to deal with them. I believe that the defendant Raymond Wright, as standing alone, has an interest in not seeing what amounts to a redirect examination as concerns him.

The Court: What is the position of other de-

(Testimony of Dewey Taylor.)

fense counsel? It appears to the Court that is a reasonable request on the part of Mr. Hepp.

Mr. Kay: As I understood it, it sounded to me like it was—in other words, I would not be allowed to question this witness about——

The Court: Anything he did with Mr. [98] Wright.

Mr. Kay: That is true. In other words, only the things that concern my client.

The Court: Very well. That will be the order.

Mr. Hepp: We are in a very awkward situation trying to get along and agree on these points in common, few as they may be.

The Court: Yes, I appreciate your position.

Mr. Nesbett: As to my client, your Honor, all I can say is that as to this witness I have no cross-examination.

The Court: Thank you.

Mr. Kay: We don't care to cross-examine this witness.

The Court: Any redirect examination, counsel?

Mr. Plummer: Just several questions, sir.

DEWEY TAYLOR

testifies as follows on

Redirect Examination

By Mr. Plummer:

Q. Mr. Taylor, have you ever been convicted of a crime? A. No, I have not.

(Testimony of Dewey Taylor.)

Q. Now, do you recall when you got out of jail on bail? A. Around the first part of May.

Q. And do you recall about when you entered your plea of guilty in this case, sir?

A. Around the first part of December of last year.

Mr. Plummer: I have no further questions. [99]

The Court: Any recross, Mr. Hepp?

Mr. Hepp: I have no further questions.

The Court: Very well. You may step down, Mr. Taylor.

(Thereupon, the witness was excused and left the stand.)

The Court: You may call your next witness.

Mr. Plummer: I request that the bailiff call Mrs. Virginia Shields. She is back in the jury room.

VIRGINIA SHIELDS

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

The Court: You may proceed, counsel.

By Mr. Plummer:

Q. Would you please state your name?

A. Virginia Shields.

Q. And what was your occupation during the Labor Day week end of 1956?

A. Clerk in the Fifth Avenue Grocery and Liquor Store.

(Testimony of Virginia Shields.)

Q. That is here in the City of Anchorage?

A. Yes, it is.

Q. Who was the proprietor of the Fifth Avenue Cash Grocery at that time? A. Mrs. Peters.

Q. And you worked for her, is that [100] correct? A. I did, yes.

Q. Now, do you know any of the defendants in this case? A. No, I don't.

Q. Did you have occasion during your employment to accept—I will withdraw that question and ask that this be marked for identification as Plaintiff's Exhibit No. 8, I believe it is.

(The document was so marked.)

Mr. Plummer: May I approach the witness, your Honor?

The Court: You may.

Mr. Hepp: I object to any questions being put unless I have had an opportunity to examine the identification.

The Court: Very well. You may show it to counsel.

(The document was handed to defense counsel and thereafter returned to Mr. Plummer.)

Mr. Plummer: May I now approach the witness, your Honor?

The Court: You may.

Q. (By Mr. Plummer): Mrs. Shields, I hand you what has been marked for identification only as Plaintiff's Exhibit No. 8. Would you look at it carefully and tell me what it is?

(Testimony of Virginia Shields.)

A. It's a check I took in on the Labor Day week end, Saturday afternoon, I believe.

Q. And would you tell me what kind of a check it is and, if you will, the serial number from the check on the front? [101]

A. Morrison-Knudsen 9078.

Q. Who is it made payable to?

A. Wendell R. Ware.

Q. Now, will you look at the back of the check and is there an endorsement on there?

A. Wendell R. Ware.

Q. And was that written in your presence?

A. Yes, it was.

Q. And can you tell us, Mrs. Shields, or can you point out to the Court and jury the man that wrote that if he is in the Court?

A. Third man over, first row, right side.

Q. Is that this gentleman in the blue suit?

A. Yes, it is.

Q. And if his name is Charles E. Smith then your answer is Charles E. Smith? A. Yes.

Q. Thank you. Now, do you remember anything about the purchase this gentleman made from you at the time he cashed the check, if in fact he made a purchase?

A. Yes, he made a purchase of whiskey, I believe it was.

Q. And did you give him the whiskey?

A. Yes, and also the change.

Q. And what is the check made out for?

A. $177.47. [102]

(Testimony of Virginia Shields.)

Q. And you took out for the whiskey and gave him the balance? A. Yes.

Q. Do you recall whether or not, Mrs. Shields, you required any identification from this witness at the time he offered you the check?

A. Yes, he showed me identification.

Q. Do you recall what kind of identification it was?

A. Well, I am not sure whether it was a driver's license or what, but a little card with his picture.

Q. It did—— A. To the left.

Q. It did have a picture on it? A. Yes.

Q. Is the picture of the same gentleman or the same likeness as this gentleman sitting here?

A. Yes.

Q. Now, I wonder if you would look at the reverse side of the check again and see whether or not it carries a bank perforation on it? A. Yes.

Q. Can you tell me whether or not your company, the Fifth Avenue Grocery, realized any cash from this check?

A. Would you state that again, please?

Q. Did the company for which you worked at that time, the Fifth Avenue Grocery, realize any money from this check? [103] A. No.

Q. And would you tell me why, if you know?

A. Well, she didn't put it through the bank. One of the policemen picked it up, picked the check up.

Q. And why did they pick it up, if you know?

A. She called up the police department and

(Testimony of Virginia Shields.)
asked them if the M-K checks were good. He said no, he would be down to pick it up.

Mr. Plummer: I have no further questions.

The Court: You may cross-examine then, Mr. Nesbett.

VIRGINIA SHIELDS

testifies as follows on

Cross-Examination

Mr. Plummer: I am sorry, your Honor. I apologize to Mr. Nesbett. I, at this time, ask leave of the Court to approach the witness and I'd like to offer that in evidence.

The Court: Is there any objection? Counsel have had a chance to see it.

Mr. Nesbett: I'd like to see it again, your Honor.

The Court: Very well. You may hand it to counsel again.

(Thereupon, the document was handed to defense counsel.)

The Court: Mr. Plummer, could you refer to the count?

Mr. Plummer: I am sorry, your Honor. That is check [104] number——

The Court: 9078.

Mr. Plummer: 9078 and it is mentioned in Count I of the indictment.

The Court: Thank you.

(Testimony of Virginia Shields.)

Mr. Nesbett: Your Honor, may I confer with Mr. Plummer a moment about this?

The Court: Yes.

Mr. Nesbett: I have no objection, your Honor, to this check going into evidence.

The Court: Without objection then it may be admitted and marked Government's Exhibit No. 8.

Mr. Plummer: There is one alteration that Mr. Nesbett wanted to make on the check. I told him I had no objection. We probably better have the in-court deputy make the alteration since it has been marked for identification.

The Court: Very well. Do you wish to state in the record what that is?

Mr. Nesbett: Extraneous marking stamps on the check, your Honor.

The Court: Is it on the instrument itself or is it on the container?

Mr. Plummer: I think it is loose within the container, your Honor. May we approach the bench?

(Thereupon, Mr. Plummer and Mr. Nesbett approached [105] the bench, without the reporter. After discussion the following proceedings were had:)

The Court: Mrs. Dome, will you please remove that white slip?

Deputy Clerk: Yes, your Honor, I did.

The Court: Mr. Plummer, is there any need to retain this slip?

(Testimony of Virginia Shields.)

Mr. Plummer: I would think not, your Honor, but——

The Court: It has identification——

Mr. Plummer: To make sure I will, if I may, take it back to my files.

The Court: Without objection. Now, you may proceed, Mr. Nesbett.

Q. (By Mr. Nesbett): Now, Mrs. Shields, about what time of the day did you receive this check?

A. It was in the afternoon.

Q. And that was Saturday afternoon, was it?

A. I believe so.

Q. You believe so? A. Uh-huh.

Q. Well, don't you know?

A. Well, it could have been Friday or Saturday afternoon, one or the other days.

Q. You have refreshed your recollection in connection with [106] the facts before coming here into court, haven't you?

A. No, I haven't thought much about it.

Q. You haven't thought much about it?

A. No, I haven't.

Q. Well, you have discussed the case surely with Mr. Plummer before coming in to be a witness?

A. Well, I don't know if I discussed it with him, no.

Q. You didn't. You don't know whether you did or not?

A. No, I wouldn't say I discussed it with him.

Q. Well, did you or didn't you?

(Testimony of Virginia Shields.)

A. Well, no.

Q. You did not. Now, it was either a Friday or a Saturday as near as you can recall?

A. Either Friday or Saturday. I don't recall which day.

Q. That was the Labor Day week end?

A. Yes.

Q. Was it rather a busy time?

A. No, we weren't busy.

Q. Is your store located in that Piggly Wiggly arrangement on Fifth Avenue.

A. No, it isn't.

Q. Where is it located?

A. 603 East Fifth Avenue.

Q. And you weren't busy at all, is that right?

A. No. [107]

Q. Do you remember this person coming to your store and buying the liquor?

A. Yes, I do.

Q. Very distinctly? A. Yes.

Q. Did you size him up and get a good mental picture of the person at the time you accepted the check?

A. I recall what he looked like, yes.

Q. And did you make a special point to remember his appearance any more than you would on any other payroll check?

A. Oh, not any more than any other.

Q. You cash a lot of payroll checks or did at that time in that store, didn't you?

A. No, we didn't.

(Testimony of Virginia Shields.)

Q. You did not? A. No.

Q. Then how does it happen you accepted this one?

A. Well, I have cashed M-K checks before and they were good.

Q. So you accepted this one?

A. Yes, I did.

Q. Well, as a matter of fact, you have accepted a lot of payroll checks in that store in the course of your business, haven't you?

A. A few. [108]

Q. Now, you say you don't recall whether he bought whiskey or what, is that right?

A. Whiskey, I would say.

Q. You would say. Well, do you recall?

A. Yes, it was whiskey.

Q. It was whiskey? A. Yes.

Q. Do you recall what he bought?

A. It was either Seagrams 7 or V.O.

Q. One bottle or two?

A. One. Just one bottle, a fifth.

Q. And took the entire change in cash, is that right? A. Yes, he did.

Q. Now, you saw an identification card with his picture on it, is that right?

A. Yes, I did.

Q. And compared the picture on the card, did you, with the person before you? A. Yes.

Q. When did you next learn or hear anything about that check?

(Testimony of Virginia Shields.)

A. When it came out in the papers.

Q. And when was that?

A. The following week. Tuesday I believe it was.

Q. You accepted the check on a Friday or a Saturday and heard nothing more about the incident until possibly the [109] following Tuesday?

A. That is right.

Q. And your information about having—or, your attention was redrawn to that check by reason of something you saw in the paper, is that right?

A. Yes.

Q. What did you see in the papers?

A. Just that the checks were going around the City of Anchorage.

Q. Actually the Fifth Avenue Liquor Store never presented the check for payment, did they?

A. Not to the bank, no.

Q. It was picked up by who?

A. A policeman.

Q. And in the course of your business after you accepted the check what did you do with it? Put it in the till of the cash register?

A. Yes.

Q. And then turned it over to your relief or were you the manager of the store in any fashion?

A. No. Mrs. Peters owned and managed the store.

Q. Then in the course of the routine of your duties you would turn over your cash and checks to Mrs. Peters, is that right?

(Testimony of Virginia Shields.)

A. Yes. We left everything in the till. She took care of everything. [110]

Q. Did you do that on that week end or do you recall? A. Turned over the cash you mean?

Q. Cash and checks?

A. I just left it in the till. I had nothing to do with that.

Q. And heard nothing more about the matter until approximately the Tuesday following?

A. That is right.

Q. Now, did you then on the Tuesday following give any description or make any identification of the person who had brought the check to your store? A. I didn't talk to anyone.

Q. And when did you next have occasion to consider the identity or description of the person who signed that check?

A. Oh, it was a year or so later that I was asked to identify the party.

Q. Over a year later. And from that point until today in court you were not asked to identify him, were you? A. Once I identified him.

Q. Well now, prior to your identification here in court today weren't you advised where the man was sitting?

A. Today I wasn't advised where he was sitting.

Q. Wasn't there a gentleman who went back to you in the back of this room and pointed out where the defendant Smith was sitting?

A. Not today. [111].

Q. Not today? A. No.

(Testimony of Virginia Shields.)

Q. When did that last happen?

A. Yesterday.

Q. It happened yesterday, didn't it?

A. Yes.

Q. It was a gentleman in a brown suit, wasn't it?

A. I'm not sure what color suit he had on.

Q. Who is the gentleman who came to you and told you where Smith was sitting?

A. Yesterday it was a policeman I believe.

Q. And—— A. I don't know his name.

Q. Which policeman?

A. Just a policeman.

Q. Well, which one? Is he in the room?

A. I don't see him.

Q. Do you know whether he is an Anchorage policeman or Territorial policeman or Federal policeman?

A. No, I don't. I wasn't informed. I don't know. Just a policeman.

Q. Where were you standing when he came to you and pointed out Mr. Smith?

A. Well, let's see. I believe I was in the District Attorney's office at the time, as far as I can remember. [112]

Q. In the District Attorney's office yesterday?

A. Yes.

Q. When he pointed out Smith to you?

A. Well, he had a drawing.

Q. Of where he was sitting in court?

A. Yes.

(Testimony of Virginia Shields.)

Q. I see. A. Yes, yesterday.

Q. What time yesterday? That was before we selected the jury wasn't it, you came into court and stayed until the witnesses were excluded?

A. It was, yes. That was before the jury was picked.

Q. Did Mr. Plummer ask you to come to his office for that purpose or for any purpose?

A. No.

Q. How did you happen to be in Mr. Plummer's office?

A. I had a telephone call from the girl asking me to appear.

Q. To come down to the U. S. Attorney's office?

A. Yes.

Q. And that was before lunch or after?

A. That was in the morning.

Q. That was in the morning, and this gentleman, this police officer then was in Mr. Plummer's office with a diagram or did he draw the diagram after you came?

A. I didn't see him draw it so I wouldn't [113] know.

Q. Did he make a sketch of the relative position that Mr. Smith occupied in the courtroom over in the Elks Club there? A. Yes.

Q. And was the sketch all prepared when you showed up in the District Attorney's office?

A. Yes, when I saw it.

Q. It was all drawn up?

A. It was drawn up.

(Testimony of Virginia Shields.)

Q. It was handed to you and a certain position marked Smith? A. Yes.

Q. Did you subsequently use that sketch and go and take a look at Smith? A. No, I didn't.

Q. Didn't you go over to the courtroom?

A. Yes.

Q. You did, didn't you? A. Yes.

Q. Did you take a look at Smith?

A. I don't recall whether I did or not.

Q. Well now, Mrs. Shields, you are here for one purpose only, aren't you, to identify a check of Mr. Smith? A. Yes.

Q. Well, didn't you after receiving that sketch at Mr. Plummer's office go over and take a look at Mr. Smith? [114]

A. We went in and sat down. I looked at him when I sat down.

Q. You did look at him?

A. When I sat down.

Q. Well, whether you were sitting down or standing up, you did look at him, didn't you?

A. Yes, I glanced over.

Q. You glanced over and saw him. You made a mental picture that that is Smith, didn't you? He was dressed just like he is now, wasn't he?

A. Yes.

Q. And so today you recognize Smith as being the same man that was pointed out to you by means of a diagram in the Elks Club courtroom yesterday, isn't that right? A. Yes.

(Testimony of Virginia Shields.)

Q. Did you observe this man who cashed that check place his signature on it, Mrs. Shields?

A. Yes.

Q. And did you compare the signature on it with the signature or the name on the identification card? A. Yes, I did.

Q. And you don't recall though what type of identification card he had, is that right?

A. No, just a card with his picture on it and name.

Q. Was there a signature on the identification card or merely a typed name? [115]

A. I don't recall now.

Q. Don't you ordinarily require as identification something with a man's signature on it?

A. Or a picture. Yes, like an I.D. card or something like that.

Q. You don't recall whether there was a signature or not on the card that was used to identify—— A. No, I don't.

Q. Nor the type card it was?

A. No, I don't know what type of card it was.

Q. And do you recall specifically the person signing the check? A. Yes.

Q. What did he use as a support in order to sign the check? Counter?

A. Yes, we have a counter.

Q. Is there a counter there?

A. Yes, there was.

Q. And did you watch him as he signed it?

A. Yes.

(Testimony of Virginia Shields.)

Q. Did he borrow a pen from you to sign it?

A. I don't recall.

Q. Well, do you recall anything else in connection with the signature? A. No. [116]

Q. Do you recall whether he signed with his left hand or his right hand or how?

A. No, I don't recall which hand.

Q. You don't recall that. You do recall, however, that you recognize the man immediately a year later after he was shown to you?

A. Yes, I recognized him.

Q. And after the diagram was presented to you, you then took another look at him yesterday in the Elks Club? A. Yes.

Q. Mrs. Shields, did you cash any other checks over that Labor Day week end, pay roll checks?

A. No.

Q. Had you, or did you have occasion to cash any other M-K checks in that area of time, that is, shortly before or shortly after Labor Day?

A. No. Just that one.

The Court: A little louder so the jurors can hear you.

A. No. I just cashed that one.

Mr. Nesbett: That is all.

The Court: Mr. Hepp, do you have any questions?

Mr. Hepp: I have no questions.

The Court: Mr. Kay.

Mr. Kay: Just a moment, your Honor. [117]

The Court: Very well.

(Testimony of Virginia Shields.)

Mr. Kay: I have no questions.

The Court: Very well. Any redirect, counsel?

Mr. Plummer: Just several questions, your Honor.

VIRGINIA SHIELDS

testifies as follows on

Redirect Examination

By Mr. Plummer:

Q. Mrs. Shields, is there any doubt in your mind that the gentleman sitting here is the gentleman who cashed the check on this Labor Day week end? A. There is no doubt.

Q. Now, to clear up any misunderstanding that might arise, although you did not talk with me did you talk with somebody else in my office?

A. Yes.

Q. And it was one of my assistants?

A. I guess so. I don't know his name.

Q. You don't know the gentleman's name?

A. No, I don't.

Mr. Plummer: That is all the questions I have.

The Court: Is there any recross?

Mr. Nesbett: Could I ask another question, your Honor? [118]

The Court: Pertaining to prior direct or redirect?

Mr. Nesbett: Would be hard to say. I am sure there won't be any objection.

The Court: You may proceed.

VIRGINIA SHIELDS

testifies as follows on

Recross-Examination

By Mr. Nesbett:

Q. Mrs. Shields, there are other employees in that liquor store, are there not?

A. No. Mrs. Peters and myself were the only two.

Q. Do you know whether Mrs. Peters took any checks over that week end, the M-K checks?

A. No, she didn't.

Q. She did not? A. No.

Q. It is a grocery store combined with a liquor store, is it? A. Yes.

Q. Six hundred block on East Fifth?

A. 603 East Fifth Avenue.

Mr. Nesbett: That is all.

The Court: Very well. You may step down then, Mrs. Shields.

(Thereupon, the witness was excused and left the stand.) [119]

The Court: You may call your next witness.

Mr. Plummer: Ask the bailiff to summon Mr. Henry Futor.

HENRY FUTOR

called as a witness for and on behalf of the Plaintiff, and being first duly sworn, testifies as follows on

Direct Examination

The Court: You may proceed, Mr. Plummer.

By Mr. Plummer:

Q. Would you please state your name, sir?

A. Henry Futor, F-u-t-o-r.

Q. And will you tell us what your occupation was over the Labor Day week end of 1956?

A. Clothing salesman at the Hub Clothing Company.

Q. And that is still your employment, is it?

A. Yes.

Q. Who is your employer?

A. Harold Koslosky.

Q. Now, what, if anything, unusual occurred on that week end as regards the case?

A. Well, that Saturday prior to the Labor Day holiday we processed and cashed three supposedly good Morrison-Knudsen checks.

Mr. Plummer: May I have this marked for identification. It will probably be No. 9. [120]

The Court: Yes.

Mr. Plummer: I will show it to counsel.

The Court: Yes, if you will please.

(Thereupon, the document was handed to defense counsel and thereafter returned to Mr. Plummer.)

(Testimony of Henry Futor.)

Mr. Plummer: May I approach the witness, your Honor?

The Court: You may.

Q. (By Mr. Plummer): Mr. Futor, I hand you what has been marked for identification only as Plaintiff's Exhibit No. 9 and ask you to look it over and tell me what it is, if you know?

A. Well, this is one of the checks that we cashed down there on that Saturday.

Q. Would you tell me what it purports to be?

A. Pardon me?

Q. Will you tell me what it purports to be, if it has a company name and a number and the amount and the payee

A. Well, it is a Morrison-Knudsen check, with a signature and the amount of—net amount of $177.47.

Q. And would you tell me the name of the payee, sir? A. Wendell R. Ware.

Q. Would you tell me the serial number of the check?

A. Serial number of the check is 8833.

Q. Do you know from your own recollection, did you take any of these checks that day? [121]

A. Well, I did. I handled all three of them and waited on the customers and in each case they made a purchase and I did inspect the identification, such as it was, and vertified the signature on the identification card with a signature on the check, endorsement on the check and assumed that they took—they were in order and Mr. Koslosky then deducted

(Testimony of Henry Futor.)

the amount of the purchase and handed over the change.

Q. And do you recall, sir, what the items were they purchased, these people, if you know?

A. Well, I do. The first purchase was a pair of Red Wing, by brand name, boots.

Mr. Nesbett: Could I interrupt merely to ask if he testifies to all three checks or as to this check?

Mr. Plummer: He is testifying now as to the three purchases made by M-K checks that week end.

Mr. Kay: I object, your Honor, to any testimony concerning the other two checks unless they are counts in this indictment.

The Court: Are they in the indictment, counsel?

Mr. Plummer: I think not, your Honor, but I will——

The Court: Objection sustained then.

Mr. Plummer: May I be heard before you rule?

The Court: Well, I have ruled but you may be heard.

Mr. Plummer: I was going to mention to the Court and to Mr. Kay, of course, the very, very common rule of the same [122] and similar transactions prove motive, mistake and so on. I think it is a very valid proffer, but rather than struggle with the thing at this time I will withdraw my question. I will advise Mr. Kay, however, that one of these days when he makes it I am going to cite him some law.

Mr. Kay: Fine, we will have a good time.

Mr. Plummer: If I may have just a minute to collect my thoughts, your Honor.

(Testimony of Henry Futor.)

The Court: Yes, you may.

Q. (By Mr. Plummer): Now, Mr. Futor, I wonder if you would be good enough to look around the courtroom and see if you recognize anybody in this courtroom that passed one of those checks to you on that date?

Mr. Nesbett: I object to that question, your Honor. It is not confined to the exhibit that is before the Court for identification. The only question is, can he identify the person who passed that check.

The Court: Objection sustained. He may rephrase the question.

Q. (By Mr. Plummer): Did you take all three M-K checks, make the sales on all three M-K checks? A. I did.

Q. And is the party, or, can you recall, sir, the name that [123] the party used?

The Court: Pardon me just a moment. Mr. Johnson, that is not the gentleman. There was another gentleman came in and maybe he is in the hall. That is all right. He is not smoking in the courtroom now. That is my concern. It is so close in here at best, besides the fact you are never permitted to smoke in the courtroom anyway. I am sorry, Mr. Plummer.

Mr. Plummer: Thank you, your Honor.

Q. (By Mr. Plummer): Do you recall the name that was used in the endorsement of the check that you took, sir? Was it Wendell R. Ware?

A. Well, I don't recall that from memory, Mr.

(Testimony of Henry Futor.)

Plummer, but as it comes back to me—naturally, I see it here.

Q. Yes, and will you look at the back of the check that you have? Would you see how it is endorsed? A. Endorsed Wendell R. Ware.

Q. Do you recognize in the courtroom the party that so endorsed and negotiated that check?

A. I am afraid I can't.

Mr. Plummer: May I have just a minute, your Honor.

The Court: You may.

Q. (By Mr. Plummer): Can you testify, sir, that that is one of the three checks that were taken in on that day?

Mr. Hepp: I object; leading and suggestive. I don't [124] think that is a proper question.

The Court: The objection is overruled. He may answer that question.

A. Well, I can testify that it is one of the three checks that was taken that day, definitely.

Q. But——

A. Without question in my mind this is definitely one of the three checks that was taken in that day at the store.

Q. Now, subsequent to its being taken in on that date do you know what, if anything, happened to the check?

Mr. Hepp: I object. I believe this witness can state what he may have done with the check. I think the question is too broad and would bring in possibly a dangerous answer. We can't evaluate the

(Testimony of Henry Futor.)

answer or his offers. He can state those things that he did. I think what was done is very broad and we ask it not be allowed.

Mr. Plummer: He can state if he knows, your Honor.

The Court: But only if you know, Mr. Futor. You may state as to what did take place with the check, if anything.

A. Well, of course, the check——

The Court: That is, of your own personal knowledge. What somebody else may have told you may not be proper. Do you understand that?

A. Yes, sir. Well, in that case then, after they left my hands, Mr. Koslosky completed the transaction. [125]

Mr. Hepp: Now, I object to the witness continuing then, this being purely hearsay.

Mr. Plummer: Let him tell what he saw until he starts telling what——

Mr. Hepp: He said Mr. Koslosky completed the transaction.

Mr. Plummer: He hadn't completed his answer. Maybe he has.

Mr. Hepp: I believe it is going to be dangerous. Once it is out it is too late.

The Court: Mr. Futor, I have instructed you not to testify as to what somebody may have told you, but what you actually know of your own knowledge, and you have testified that Mr. Koslosky completed the transaction. Now, you may proceed, counsel.

(Testimony of Henry Futor.)

Q. (By Mr. Plummer): Now, did you or did anybody else within your sight have any further dealings with this check, sir, or do you know of your own knowledge anything further about this check, not what somebody told you but of your own knowledge?

A. Well, of my own knowledge I know they were deposited in the bank in the National Bank of Alaska.

Mr. Hepp: I object to that and ask it be stricken. I don't see how he could possibly know that of his own knowledge. It would have come to him as purely hearsay and that is what we [126] have been trying to avoid.

The Court: How do you know?

Mr. Plummer: The witness testified, he said of his own knowledge he knew it was.

The Court: The objection is overruled until it is established that he is testifying from hearsay, of course, in which event then it would be highly improper.

Mr. Hepp: Excuse me. May I ask the Court to instruct the witness as to what the word knowledge means in that sense. To a layman it means anything he comes by knowing in any manner and it may be told to him by somebody else and he then deems it his knowledge, and it is still objectionable.

The Court: In this sense, Mr. Futor, the word knowledge is used in a restrictive sense, only what you personally know, not what may have come to your attention. Now, you have testified that this

(Testimony of Henry Futor.)

check was deposited in the bank. Do you know that of your own knowledge or what somebody else told you?

A. Well, it was the procedure in this business.

The Court: Well, the objection is sustained then.

Q. (By Mr. Plummer): Now, did you have occasion, sir, to see the check again after that week end when it was presented to you as part of the payment for the sale you made? A. I did.

Q. And would you tell us when that was, [127] sir?

A. Well, when this check was returned to the Hub Store by their bank, the one in which it was deposited, with the bank's notation—just what the notation was on there I have forgotten, but it was either an unauthorized signature or counterfeit or forgery. I rather think it was unauthorized signature, whatever they stamped on there.

Mr. Hepp: I am going to object to that testimony. This witness is guessing at what may have been on it when it came from the bank.

The Court: The objection is sustained. You may testify as to what was on it.

Mr. Hepp: I would like to have that portion of his testimony stricken from the record.

The Court: The motion is granted and the jury is instructed not to consider the answer given by this witness. You may proceed.

Mr. Plummer: May I have just a minute?

The Court: Yes, you may.

Mr. Plummer: I have no further questions.

HENRY FUTOR

testifies as follows on

Cross-Examination

By Mr. Nesbett:

Q. Mr. Futor, did you take all three of the M-K checks that [128] were received by your store on that day?

A. I did and I processed them.

Q. Are you the manager there in Mr. Koslosky's absence? A. Oh, after a fashion, yes.

Q. But you do pass on all the checks that are presented for cashing, is that right?

A. In many instances, yes, if he doesn't—happens to be away or out.

Q. After you had cashed the checks Mr. Koslosky had the most to do with them thereafter, is that right? A. I didn't get that?

Q. I say, after you had accepted the checks Mr. Koslosky had the most to do with them thereafter, did he not? A. Oh, yes. Yes.

Q. And it was more his concern as owner of the store than yourself as manager, isn't that a fact?

A. Right.

Q. Now, actually, Mr. Futor, until you were reminded of the name Wendell Ware you wouldn't have known that that check, as you say now, was one of those accepted, isn't that the fact?

A. Well, I just didn't quite understand that question.

Q. When were you subpoenaed to appear here?

A. Yes, sir.

(Testimony of Henry Futor.)

Q. And on what date were you subpoenaed to appear? [129]

A. I didn't bring the subpoena.

Q. Was it to appear yesterday?

A. I was subpoenaed to appear.

Q. Yesterday? A. Yes, sir.

Q. And did you appear first in response to that subpoena at the courtroom at the Elks Hall?

A. Yes, sir.

Q. Or did you appear in Mr. Plummer's office?

A. Well, I appeared at the office and then was instructed to go to the courtroom in the Elks Club.

Q. And at the time you reported to the office did you discuss the matter of checks that had been received by Koslosky's Store with Mr. Plummer or any of his staff? A. No.

Q. Did you discuss the checks that Koslosky's Store had received with Mr. Plummer at the courtroom yesterday? A. No, sir.

Q. Or did you discuss it last night or today with him prior to taking the witness stand?

A. No, sir.

Q. It is only because the check was handed to you on the witness stand that you happened to remember that it is one of the three checks you took that day, is that right?

A. Yes, that is right. [130]

Q. You have no recollection then other than that it was one of the three?

A. Well, I have the recollection that this is one of the three.

(Testimony of Henry Futor.)

Q. What causes you to remember that it was one of three?

A. The amount. I remember the amount very well. $177.47. The date. Pay period ending August 19. We were cashing this along about September 2nd. That all is remindful to me of this check.

Mr. Nesbett: That is all, your Honor.

The Court: Mr. Hepp.

Mr. Hepp: I have no questions.

The Court: Mr. Kay.

HENRY FUTOR

testifies as follows on

Cross-Examination

By Mr. Kay:

Q. Mr. Futor, just one question. Do you recall what time in the afternoon it was when you cashed this check? A. Mid-afternoon.

Q. 3:00 o'clock, 4:00 o'clock?

A. Between 2:00 or 3:00, I'd say.

Mr. Kay: That is all the questions I have.

The Court: Any redirect, counsel?

Mr. Plummer: No, your Honor. [131]

The Court: It is now after 3:00. Should we take a short recess at this time?

Mr. Plummer: Satisfactory with the prosecution.

The Court: Very well. Court will go into recess for a period of 10 minutes.

(Whereupon, at 3:10 o'clock p.m., following a 10-minute recess, court reconvened and the following proceedings were had:)

The Court: Let the record show all the jurors are back and present in the box. You may call your next witness.

Mr. Plummer: May I inquire if there are any witnesses in the courtroom that are under Government subpoena? (No response.) Your Honor, I would like to call—for the sake of the record the last check we talked about was No. 8833. It was mentioned in Count 3 of the indictment. I would like to call Mr. Ivan Barton.

Mr. Hepp: Excuse me, may it please the court, I have an observation to make. I think Mr. Plummer has confined the witnesses who are under subpoena. We do not desire to waive the rights of that rule and any witnesses he intends to or will call and not only the ones that are under subpoena.

Mr. Plummer: I think that was the statement I made. I think I will probably know the witnesses that I intend to call that might not be under subpoena. As you well know, from the witness stand, people who are identification witnesses I haven't talked with them. I don't know whether they are present in court [132] or not.

The Court: Now, your next witness, please.

Mr. Plummer: Mr. Barton.

IVAN BARTON,

called as a witness for and and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

By Mr. Plummer:

Q. Would you please state your name, sir?

A. Ivan Barton.

Q. And would you tell me what your occupation was over the Labor Day weekend of 1956 here?

A. I am a partner in the Union Club.

Q. And were you a working partner that day at the Union Club? A. Yes.

Q. On duty there? A. Yes.

Mr. Plummer: May I approach the witness, your Honor?

The Court: You may.

Q. (By Mr. Plummer): Mr. Barton, I hand you what has been marked for identification only as Plaintiff's Exhibit No. 10 and ask you what it is, if you know? A. It is a check. [133]

Q. And will you be good enough to tell us the name of the company, the name of the payee, and the serial number of the check?

A. It is a Morrison-Knudsen Company check. Payee is Wendell R. Ware. $177.47.

Q. What is the serial number on the check?

A. 8895.

Q. Now, have you had occasion to see that check before? A. Yes, I have seen it before.

Q. Did you have occasion to see it on Labor Day weekend 1956?

(Testimony of Ivan Barton.)

A. Well, I saw it when it come back from the bank after the weekend.

Q. Will you tell us, sir, if you know who cashed that check in your establishment?

A. No, I don't know who cashed this particular check. There was four checks presented.

Mr. Hepp: Just a moment. I object to any further. I think the witness responded to the question and I ask another offer be made.

The Court: I feel, Mr. Hepp, that the answer to the question was responsive. He was explaining why he didn't know this.

Mr. Hepp: I quite agree with the Court. I was asking that he not continue on until after he had been asked for another offer so we can evaluate it. [134]

The Court: Thank you. You may proceed, Mr. Plummer.

Mr. Plummer: Thank you, your Honor.

Q. (By Mr. Plummer): Now, did you receive a check, Morrison-Knudsen check, that week end which was made payable to the order of Wendell R. Ware? A. Yes.

Q. And was there a gentleman that you noticed that week end in your establishment who purported to be Wendell R. Ware?

Mr. Nesbett: I object to that question, your Honor, as having no connection whatsoever with the case. He admits that he wasn't there over the week end. He is not competent to answer. He came back after the week end and saw the checks.

(Testimony of Ivan Barton.)

Mr. Plummer: That wasn't his testimony, your Honor. If the record is read back that is not his testimony.

The Court: The objection is overruled. He may answer the question; of your own knowledge, of course, Mr. Barton, not what somebody may have told you.

A. Will you repeat the question?

The Court: It may be read back.

(Thereupon, the Reporter read question line 8 above.)

A. Yes.

Q. (By Mr. Plummer): And do you see him present in the courtroom today?

A. I do. [135]

Q. And will you point him out to the Court and jury?

A. He is right back of the gentleman right back there (pointing), third seat in.

Q. Third seat in the front row?

A. Uh-huh.

Q. Would this be the gentleman, sir?

A. That is the gentleman.

Q. And if his name is Charles E. Smith it would then be Charles E. Smith, is that correct?

A. Uh-huh.

The Court: You will have to speak louder, Mr. Barton, please.

A. Yes.

Mr. Plummer: May I have just a minute, your Honor.

(Testimony of Ivan Barton.)

The Court: You may.

Q. (By Mr. Plummer): Now, do you know, sir, what happened to this check after it was taken in during the normal course of business over that Labor Day week end, of your own knowledge?

A. Well, I didn't take it myself to the bank, but my partner took it to the bank.

Mr. Hepp: Just a moment. I object. That is hearsay. I think he responded he didn't take it to the bank.

The Court: The objection is sustained beyond the fact that you don't know what happened after the week end. [136]

Mr. Plummer: May I ask one further question, your Honor?

The Court: Very well.

Q. (By Mr. Plummer): Did you see it after the Labor Day week end around your establishment? A. Yes.

Q. And what was the occasion for you seeing it, sir?

A. Well, I come down to work, I think it was probably Thursday, and the check was back from the bank. Our bank is not the First National Bank. Our bank is the Bank of Alaska and it takes a couple of days to process it through the bank and I don't remember which day it was of the week.

Q. And was the check honored when presented for payment, sir?

A. No, it was deducted from our account.

Mr. Plummer: May I approach the witness, your Honor.

(Testimony of Ivan Barton.)

The Court: You may.

Mr. Plummer: I offer what has been marked for identification only as Plaintiff's Exhibit No. 10 in evidence.

The Court: Is there any objection?

Mr. Hepp: We object to it and we'd like to ask some questions of this witness.

The Court: You may do so.

Q. (By Mr. Nesbett): Mr. Barton, what hours or shift did you work over that Labor Day week end? [137] A. From 5:00 until closing.

Q. 5:00 p.m. until closing? A. Yes.

Q. That would be until 1:00 a.m.?

A. Well, I think it was 2:00 a.m.

Q. 2:00 a.m., and on what days did you work? All the days? A. All the days.

Q. All the days of that holiday week end?

A. All the days.

Q. Now, you have known the defendant Charles Smith for a long time, haven't you?

A. No, I haven't.

Q. Well, haven't you known him in the construction industry, his superintendent, co-workers for a number of years?

A. No, I haven't known him personally.

Q. You have known of him, is that right?

A. Well, I don't think I even knew of him that I know of.

Q. Do you remember yourself taking this check in and giving cash for it?

(Testimony of Ivan Barton.)

A. I don't remember of taking that check and giving cash for it.

Q. You cash lots of payroll checks there, don't you? A. Yes, quite a few.

Q. At the Union Club? A. Yes. [138]

Q. As a matter of fact, you advertise over the radio, "Come to the Union Club. We cash payroll checks," don't you? A. That is right.

Q. And you don't remember this check at all, do you?

A. I remember the check. Surely, I remember the check. It comes back from the bank and you have to pay the bank $177.00 for it, you sure remember.

Q. That is your only connection with this check, isn't it? A. Except cashing it.

Q. You remember cashing it yourself?

A. Well, it was cashed in the place.

Q. But you, yourself didn't? You don't remember cashing it yourself, do you?

A. I don't remember cashing it.

Q. No. Now, have you talked to Mr. Plummer prior to coming into court today about Wendell R. Ware? A. Yes.

Q. And when did you last discuss Wendell R. Ware with him?

A. Well, I don't think I discussed Mr. Ware recently with Mr. Plummer. I did with his assistant, I guess it is, in his office.

Q. I see. Well, when did you discuss Mr. Ware with Mr. Plummer's assistant?

(Testimony of Ivan Barton.)

A. This week sometime, last week. Latter part of last week. I think it was Thursday. [139]

Q. Last Thursday. Now, Mr. Barton, have you discussed the case at all with Mr. Plummer or his assistant since last Thursday?

A. Except, I think it was yesterday.

Q. You discussed it with him yesterday, didn't you?

A. He told me the things about the court that I would be asked; not particularly about the check.

Q. And where was that discussion had, over in his office? A. Over in his office.

Q. And was Sgt. Laird here present?

A. I don't think so.

Q. You did, of course, discuss Mr. Smith and how he appeared and so on, did you not?

The Court: Pardon me. Now you are going into cross-examination here. This is for the purpose of admission or denial of admission of this check.

Mr. Nesbett: Well, I thought that he was through with his direct.

The Court: But then the only thing before the court is the admissibility or inadmissibility of the check.

Mr. Nesbett: I see. All right, your Honor, I am sorry. I will confine it strictly to the check.

The Court: Very well.

Q. (By Mr. Nesbett): Then you, yourself, don't remember this check coming across [140] the counter of the Union Club? Your only recollection or remembrance of it, you say, as partner there you

(Testimony of Ivan Barton.)

had occasion to notice it came back from the bank, is that right?

A. No. I know it come across the counter while I was on shift so I must have cashed it because the checks cashed in the day time by my partner, he bales them up. When I come down it is an empty box. It was in the bale of this cash from the night shift.

Q. So you must have cashed it?

A. I must have cashed it.

Mr. Nesbett: I have no further questions on the check, your Honor.

The Court: Mr. Hepp, do you have any questions on the check itself?

Mr. Hepp: Mr. Nesbett has covered the field I wanted.

Mr. Plummer: I renew my offer, your Honor.

The Court: Is there objection?

Mr. Nesbett: I certainly agree with Mr. Hepp's objection. The objection stands, must be ruled on.

The Court: Objection overruled. It may be admitted and marked Government Exhibit No. 10.

Mr. Plummer: I have no further questions, your Honor, of Mr. Barton.

The Court: Could you advise the Court as to which count? [141]

Mr. Plumber: I am sorry, your Honor. This is check 8895 mentioned in Count No. 4 of the indictment.

The Court: Thank you. Now, you may cross-examine, Mr. Nesbett.

IVAN BARTON

testifies as follows on

Cross-Examination

By Mr. Nesbett:

Q. You don't remember yourself of actually taking this check across the counter, do you, Mr. Barton? A. I do not.

Q. Then you would have no recollection of the person from whom you received the check, would you?

A. Well, I have a recollection of cashing a check for a fellow that later I saw and I knew I had cashed a check for him. He was Mr. Smith.

Q. I see. Well now, I believe you said in response to one of Mr. Plummer's questions that you recall a man named Wendell Ware being around that week end, is that right?

A. Well, the man Wendell Ware, when I saw him, was over in the federal jail, I guess, and I identified him as a man I had cashed a check for during that period of time.

Q. Well, when did you make that identification?

A. Oh, sometime last spring, I think. [142]

Q. Did you identify him as being a man who passed himself as being Wendell R. Ware in your establishment?

A. No, I didn't, no. I just identified him as being a man I cashed a check for.

Q. Cashed a check for? A. Yes.

Q. Then you didn't connect the man up with Wendell R. Ware at that time, did you?

(Testimony of Ivan Barton.)

A. No.

Q. You didn't then—your only knowledge that the man may have ever been called Wendell R. Ware was knowledge you obtained from Mr. Plummer or his assistant, wasn't it?

A. Well, I was told what he used his name for on the check and what his name was. His name was Smith.

Q. So you assumed he was Wendell R. Ware or had called himself Wendell R. Ware, isn't that right?

A. Well, I didn't assume anything. I just——

Q. You don't recall the man named Wendell R. Ware coming to you and asking to cash a check, do you? A. As Wendell R. Ware?

Q. Yes. A. I do not.

Q. And you say you only identified Mr. Smith as being a man who cashed a check in your establishment over that week end, is that right? [143]

A. That is right.

Q. So your only knowledge of Smith and Wendell R. Ware having any connection is what you gained from being associated with the case, isn't that right?

A. No. When I got the check back I begin to wonder who cashed that check, to picture in my mind of someone that cashed that particular check, and I finally come to the conclusion that it was a fellow that I had to call over from the——

The Court: Pardon me. (Noise outside. Unable to hear.)

(Testimony of Ivan Barton.)

A. I come to the conclusion in my own mind it was a fellow I had to call over and sign his check and show an identification. He was standing back of the place, in the back. He was four or five feet from the little counter where we used to cash checks.

Q. Well, did you call a person over and ask him about the check? Is that——

A. No, I didn't. Just to look at his identification.

Q. You came to the conclusion that must have been what happened, is that right?

A. Pardon?

Q. You came to the conclusion you must have done that when you were thinking it over later, is that right? A. That is right.

Q. Why did you say then in response to the question that you don't remember cashing this check? If you remember a [144] Wendell R. Ware and you remember that this must have been the man, why do you say you don't remember cashing this check?

A. Well, there was four of those checks come in on the week end and I don't remember which particular check that was, Wendell R. Ware's or the other checks. It was one of those M-K checks.

Q. Now, Mr. Barton, were you told yesterday in Mr. Plummer's office to look for Mr. Smith over at the Elks Club? A. To look for him?

Q. Yes. A. No.

Q. Were you told where he might be sitting?

A. Yes.

(Testimony of Ivan Barton.)

Q. Were you given a diagram of where he might be sitting? A. No.

Q. Did you see a diagram or sketch that portrayed the relative positions of persons in the courtroom? A. No.

Q. You were told then where Mr. Smith was sitting, is that right?

A. I was told where he was sitting.

Q. And were you told to take a look at him?

A. No.

Q. You were just told, "There is where Smith is going to be [145] sitting," is that right?

A. I was asked if I knew him, where he was sitting, and I said yes; if I knew his face, I said yes.

Q. Why did they then go on to tell you where he was sitting?

Mr. Plummer: I object to that question. He can't answer that.

Mr. Nesbett: Maybe he can't but I want the court to be aware of it, your Honor.

The Court: Well, the objection will be sustained to that question, but you may rephrase your question and ask if he knows why they told him.

Q. (By Mr. Nesbett): Do you know why the District Attorney went ahead and told you where Smith was sitting when you told him in the first instance that you knew Smith?

A. I don't know why.

Q. You don't know that?

A. No, I don't.

Q. Well, the only logical conclusion would be——

(Testimony of Ivan Barton.)

Mr. Plummer: I object to any——

The Court: Objection sustained.

Mr. Nesbett: I haven't asked the question.

The Court: Excepting this, you are making a statement.

Mr. Nesbett: I will make a question of it.

The Court: The question now attempted to be stated [146] is improper and the objection is sustained.

Q. (By Mr. Nesbett): You indicated some doubt about whether or not you could recognize Smith or Ware, didn't you, to Mr. Plummer before he told you where he was sitting?

A. No, I didn't at all because I knew I could recognize him because I have saw him around town here since—for the last month or two.

Q. Was he pointed out to you when he came to town at all? A. No.

Q. I asked you in the first instance if you hadn't known him for a number of years. You have, haven't you? A. No, I haven't.

Q. But you knew him when you saw him around town?

A. I had already been down to the Marshal's Office.

Q. So you remember it from that incident, is that right? A. Yes.

Q. Well now, why did you go on over to the courtroom after you had talked to Mr. Plummer yesterday?

(Testimony of Ivan Barton.)

A. He told me to go—the girl in the office told me to go over to the courtroom.

Q. You wanted to take a look at Smith, didn't you? He asked you take a look at Smith, didn't he?

A. No.

Q. Well, he asked you if you recognized Smith, didn't he? [147]

A. I don't remember him asking that question.

Q. Well, he asked you if you knew Smith, didn't he?

A. He asked me if I knew Smith but not yesterday. That was previous to that.

Q. You said, "Yes, I know him," didn't you?

A. Yes.

Q. Yet he went ahead to take the trouble to tell you exactly where he was sitting in the courtroom, didn't he?

A. I don't remember whether he told me exactly where he was sitting.

Q. Well, I understood now in your previous testimony, Mr. Barton, that he did tell you?

A. Well, he probably did tell me.

Q. Then which is true? He did tell you, didn't he?

A. I don't think Mr. Plummer ever did tell me where he was sitting.

Q. That was his assistant, wasn't it?

A. I think it was his assistant that told me where he would be sitting.

Q. Was it Sgt. Laird here to my right?

A. Over in the Elks, you mean, yesterday?

(Testimony of Ivan Barton.)

Q. Yes.

A. Yes, I think Sgt. Laird told me where he was sitting.

Q. He told you where he was sitting over in the Elks Club, did he? At the Elks Club did Sgt. Laird tell you where Smith was sitting? [148]

A. Yes.

Q. Who in Mr. Plummer's office told you where he would be sitting?

A. I think it was his assistant, probably.

Q. Thin assistant, wore glasses, Mr. Duggar?

A. Well, I don't remember. Somebody told me over there where he would be sitting.

Q. Well, you were told in the office, then by Sgt. Laird over in the courtroom. Now, were you reminded again here today where he might be sitting in the courtroom? A. Uh-huh.

Q. You were? A. Yes.

Q. Who reminded you on that occasion?

A. I think it was Mr. Anderson.

Q. Mr. Anderson?

A. I think his name is Anderson.

Q. Who is he, do you know? Is he in the room?

A. He is a city detective, I think.

Mr. Nesbett: I have no other questions.

The Court: Mr. Hepp.

Mr. Hepp: I have just one question.

IVAN BARTON

testifies as follows on [149]

Cross-Examination

By Mr. Hepp:

Q. This may have been answered, but it has escaped me. If you didn't see this check cashed or have no recollection of it what is your explanation as to how you know who cashed it?

A. I don't know who cashed it. I know that I cashed it. I mean, I don't know who presented it.

Q. You mean, the person who came in and offered it?

A. I don't know except from recalling instances in cashing checks, that you do in a place, and when it comes back from the bank and I begin to wonder who cashed it, if I knew the people.

Q. So you have wondered into a belief that it may be somebody in this courtroom, is that right?

A. I don't know that it was cashed by this man in the courtroom, but I know that I have cashed checks for him in the place.

Q. Did I understand you to say you don't know whether this check here was cashed by anybody in this courtroom? A. No, I don't.

Q. You don't know? A. No, I don't.

Mr. Hepp: Thank you.

The Court: Mr. Kay. [150]

Mr. Kay: Just one question.

HELEN BURNETT,

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

The Court: You may proceed, counsel.

By Mr. Plummer:

Q. Would you please state your name?

A. Helen Burnett.

Q. Do you and your husband have a joint business venture here in the City of Anchorage?

A. Yes, we do.

Q. Would you tell me the name?

A. The Club Bar.

Q. And did you so own it on the Labor Day week end of 1956? A. Yes, we did.

Q. And do you and your husband both work in the bar? [153] A. Yes, we do.

Q. And were you working there that week end?

A. Yes, I was.

(At this time a document was handed to defense counsel and thereafter handed back to Mr. Plummer.)

Mr. Plummer: May I approach the witness, your Honor.

The Court: You may.

Q. (By Mr. Plummer): I hand you, Mrs. Burnett, what has been marked for identification only as Plaintiff's Exhibit No. 11 and ask you if you will tell us what it is?

A. It's one of the checks that I cashed over the Labor Day week end.

(Testimony of Helen Burnett.)

Q. And would you tell me—reading the heading on the check, the payee, the serial number, and the amount?

A. Morrison-Knudsen Company Check No. 8965 to be paid to the order of Wendell R. Ware in the amount of $207.26.

Q. Now, do you know who accepted that check on behalf of your establishment?

A. Yes, sir, I did.

Q. And would you give us some of the details, if you recall, when you accepted it?

A. Yes, sir. The gentleman came in, asked me if I would cash a check for him. I said yes, if it were a pay check. He handed me the M-K check and the identification badge [154] with his picture on it. I proceeded to cash the check and give him the money and he in turn ordered a drink. I believe he ordered a drink, whiskey and a beer.

Q. Maybe a shot and beer chaser?

A. Uh-huh.

Q. And did he endorse the check in your presence? A. Yes, he did.

Q. And will you look at the back of the check and did he endorse it with that name?

A. Yes, he did.

Q. Now, this identification card that he presented to you, did that correspond with the face of the man that presented the check?

A. Yes, it had his picture on it.

Q. Now, will you tell us if you see that man in court here today?

(Testimony of Helen Burnett.)

A. Yes, I do. He is sitting right over there. The third gentleman in the first row.

Q. That would be this gentleman in the blue suit with the handkerchief in his pocket?

A. Yes, sir.

Q. If his name is Charles E. Smith, is that Charles E. Smith?

A. That is the gentleman.

Q. Mrs. Burnett, did you later cause this check to be deposited in the bank? [155]

A. Yes, sir, on the following Tuesday.

Q. And was the check honored when it was presented for payment?

A. It was honored at that time, however, it was later declared to be a forgery and returned.

Q. What bank did you present it to?

A. The First National Bank.

Q. And it was later returned to you and dishonored?

A. This check was not returned to me, no, sir. A photostatic copy was.

Q. And did they advise you at that time why they did not return it? A. Yes.

Q. Will you tell me why?

A. It was a forged check.

Mr. Plummer: May I approach the witness, your Honor.

The Court: You may.

Mr. Plummer: I am going to offer this in evidence. I show it to counsel again.

(Testimony of Helen Burnett.)

(The document was handed to defense counsel.)

The Court: Is there objection?

Mr. Hepp: Just a moment.

The Court: Surely.

Mr. Nesbett: You Honor, I object to the acceptance of the check into evidence and ask if your Honor would be good [156] enough to reserve your ruling on it until after the cross-examination. In view of what happened with respect to the last check, your Honor, we thought if your Honor would delay ruling until after all the evidence is in it might——

The Court: Well, counsel, though we must take these matters as they come up. If we don't it is very easy to forget. I would prefer to follow the customary and standard practice of the court. Now, counsel have leave to interrogate at this time as to the admissibility or inadmissibility of this check only, then you may thereafter cross-examine as to other facts. Do you wish to examine at this time?

Mr. Nesbett: I have no desire to examine as to the check.

The Court: Mr. Hepp?

Mr. Hepp: Well, no. I certainly make an objection at this time and I know the Court has ruled.

The Court: Very well. Objection overruled. It may be admitted and marked Plaintiff's Exhibit No. 11.

Mr. Plummer: May I for the sake of the record advise the Court and the jury that we are talking

(Testimony of Helen Burnett.)
about Check No. 8965 which is mentioned in Count 5 of the indictment.

The Court: Thank you.

Mr. Plummer: I have no further questions of this witness, your Honor.

The Court: You may cross-examine, Mr. Nesbett. I'd [157] like to suggest to counsel that we have a stipulation from counsel that as exhibits are admitted they may be read in whole or in part at that time and/or counsel may reserve the right to read or refer to these exhibits at a later time in whole or in part or in use in argument to the jury only.

Mr. Plummer: That would be satisfactory with the prosecution, your Honor.

Mr. Nesbett: That is agreeable to the defendant Smith.

The Court: Mr. Hepp:

Mr. Kay: Yes, I will stipulate.

The Court: Mr. Hepp.

Mr. Hepp: Yes.

The Court: Very well. That will be the order. You may proceed, Mr. Nesbett.

HELEN BURNETT

testifies as follows on

Cross-Examination

By Mr. Nesbett:

Q. Mrs. Burnett, did you cash a number of payroll checks in the Club Bar over that particular week end? A. Yes, I did.

(Testimony of Helen Burnett.)

Q. Do you know approximately how many you cashed?

A. No, at this time I wouldn't have any idea. [158]

Q. You do cash quite a number of those payroll checks there, do you not? A. Yes.

Q. For construction people, railroad people?

A. Yes, sir.

Q. You have a set routine that you go through in checking identification cards against the signature, do you not? A. Yes, sir.

Q. Did the card that was exhibited to you contain a signature of the person named Wendell Ware? A. It did.

Q. It had his signature right on the card, did it?

A. Yes, sir.

Q. And did you observe that signature?

A. I compared it with the signature on the check, sir.

Q. And you must have been satisfied with the resemblance or you wouldn't have taken the check?

A. Yes, sir, I was. The picture and signature were identical.

Q. Do you recall now about what time of the day this person came to your place?

A. I would say it was approximately 4:30 to 5:00 o'clock in the afternoon.

Q. Of a Saturday? A. Yes, sir.

Q. And did he order his whiskey and beer before he asked to [159] cash the check or afterwards?

(Testimony of Helen Burnett.)

A. No, he asked me first if I would cash the check.

Q. Then you must have been standing in front of the establishment?

A. I was standing at the cigar counter by the safe.

Q. Was there a bartender on duty also?

A. Yes, there was a bartender farther on down the bar.

Q. There were a number of payroll checks presented that week end, were there not?

A. Yes.

Q. Quite a number?

A. Yes, on holiday week ends there usually is.

Q. Did you observe this person sign the check himself?

A. Yes, I did. I stood in front of him and waited for him to sign it so I could compare the signature.

Q. Did you observe how he signed it or any peculiarities about his signature or the method used to sign it? Was he right-handed or left-handed?

A. I believe he was right-handed, sir.

Q. I see. And was he standing just across the counter from you? A. Yes, he was.

Q. And did he use your pen or did he have a pen of his own? A. He used my pen.

Q. How was he dressed? [160]

A. He was dressed in working clothes with a hard hat.

Q. With a hard hat? A. Yes.

Q. Do you recall the kind of clothes he had on?

(Testimony of Helen Burnett.)

A. He had on the usual construction men's clothes. Heavy duty type clothes, you would say.

Q. Well, woolen plaid shirt, say?

A. I believe he had on a sweat shirt, sir.

Q. Sweat shirt? A. I think it was.

Q. And what is a hard hat? You mean a helmet, construction——

A. Yes, the type that many of them are required to wear.

Q. You observed this man pretty closely, didn't you?

A. I observe most of my customers that way.

Q. Do you remember them all that well?

A. Not all of them. Specific instances remind you of specific people.

Q. You happened to remember this particular instance very well? A. Yes, sir.

Q. Well, Mrs. Burnett, you were over in the courtroom yesterday, weren't you?

A. Yes, sir, I was.

Q. And Mr. Plummer asked you to come over, did he not, or someone in his office? [161]

A. Yes, sir.

Q. You were subpoenaed in this case?

A. Yes, I was.

Q. Were you told to look for Mr. Smith or Mr. William—Wendell Ware?

A. I was told that he should be in the courtroom.

Q. You were told he should be in the courtroom?

A. Yes, sir.

Q. Is that all you were told? A. Yes, sir.

(Testimony of Helen Burnett.)

Q. Is that all?

A. Well, I was told what proceedings would take place, that I would be put on the witness stand and asked questions.

Q. You were just told that Smith or Wendell Ware would be in the courtroom, is that all?

A. Yes, and that I would be asked to identify him.

Q. You would be asked to identify him?

A. Yes, sir.

Q. And were you asked if you thought you would be able to identify him? A. Yes, I was.

Q. And were you? What did you say?

A. I told them I thought that I could. I identified him in a police line-up sometime ago.

A. They did go ahead, however, and tell you exactly where [162] he would be sitting, didn't they?

A. Not that I recall, no, sir.

Q. Not that you recall? A. No, sir.

Q. Don't you want to tell the Court and jury everything in that respect? Answer my question fairly now. Did they tell you where he would be sitting?

A. No. They told me that he would be sitting in the courtroom as a spectator.

Q. Did they tell you where he would be sitting?

A. No. They moved several times while I was there, sir.

Q. Who moved?

A. Well, there was a recess of the court.

Q. Now, to get back to my question, Mrs. Bur-

(Testimony of Helen Burnett.)

nett. Didn't they tell you just where Mr. Smith would be sitting when you were over there?

A. Not exactly, no. They told me he would be in the courtroom.

Q. I see. Well, not exactly, but did they tell you approximately where he would be sitting?

A. I believe they told me he would be sitting on the same side as the counsel were sitting.

Q. And you believe they told you that. Well, they did tell you that, didn't they?

A. They told me he would be in the courtroom probably on the [163] side of the counsels.

Q. And didn't they show you a diagram, rough layout of the courtroom——

A. No, I asked——

Q. Pardon me. (Continuing): ——at approximately where the counsel and the parties would be sitting?

A. Before I went up I asked them how the court was situated in the Elks Hall because I am aware or acquainted with the building and they explained to me how the deal was set out.

Q. Well, how did they happen to mention to you that Smith would be sitting in there behind counsel?

A. I wouldn't know, sir, how those things are brought up.

Q. Well, you must have asked where he would be sitting?

A. I asked them the layout of the court and they explained to me he would be there or possibly behind counsel's table.

(Testimony of Helen Burnett.)

Q. That was in response to your request and they gave you the information that you wanted, didn't they? A. Yes, sir.

Q. As a matter of fact, Mrs. Burnett—rather, I will ask you this: Did Mr. Plummer give you that information in his office as to the layout in the courtroom? A. No, he did not.

Q. Was it Mr. Duggar? Do you know him by name?

A. I don't believe I saw Mr. Duggar yesterday.

Q. Was it Sgt. Laird here? [164]

A. No, it wasn't.

Q. Someone in Mr. Plummer's——

A. It was one of the boys that were instructed to tell me where to go and what time. I believe his name is Anderson, isn't it?

Q. Mr. Anderson?

A. I believe that is his name, yes.

Q. Now, after you arrived in the courtroom yesterday—that was yesterday morning, wasn't it?

A. No, that was yesterday afternoon.

Q. And about what time did you arrive there? Right at 2:00 o'clock when the court——

A. I arrived just as you were picking the final alternate witness.

Q. Did you have occasion to confer with Mr. Anderson there in the courtroom or Sgt. Laird?

A. I don't remember. I think it was over in Mr. Plummer's office.

Q. Well, I am speaking now of the courtroom after you came there shortly after 2:00?

(Testimony of Helen Burnett.)

A. No, I conferred with no one there.

Q. Did anyone of Mr. Plummer's staff or his assistants point out to you then at that time where Mr. Smith was sitting?

A. No, they did not. [165]

Q. You had only the instructions that were given you in the office as to where he would be sitting?

A. Yes, sir.

Q. Did they tell you how he would be dressed?

A. No, I don't recall that they did.

Q. Well——

A. They asked me if I was sure I could identify him and I said yes. He has a very distinctive face.

Q. I didn't ask you that. I asked you if—didn't you have some doubt? Didn't you ask a question that would cause them to say, "He is going to be sitting right behind counsel"?

Mr. Plummer: I object to the question as having been asked and answered at least four times in the cross-examination.

The Court: Well, this is cross-examination. The Court must afford counsel reasonable latitude. I will permit counsel to ask this once more. You may proceed.

Mr. Nesbett: Thank you, your Honor.

Q. (By Mr. Nesbett): Didn't you ask the question of Mr. Plummer or his assistants that would cause them to take the trouble to explain to you the courtroom layout in the Elks Club and where Smith would be sitting?

A. Yes, sir, to the extent that I have told you.

(Testimony of Helen Burnett.)

I asked them [166] how the courtroom was layed out and where I would have to go and they in turn explained to me where the counsel's tables were and how the seating was and that Smith would undoubtedly be sitting behind counsel's table.

Q. Your main question was only what is the courtroom layout and they took the trouble to explain to you exactly where Smith would be sitting, is that right?

A. No, they didn't tell me exactly where Smith would be sitting.

Q. They told you he would be sitting behind counsel, however, is that right? A. Yes, sir.

Q. Now, didn't you talk with Sgt. Laird or someone in that courtroom after you got there after 2:00 o'clock yesterday and before the witnesses were asked to leave concerning Mr. Smith's location?

A. No, I did not.

Q. You talked with the other witnesses who were with you about it?

A. I came in alone, sir.

Q. But you were sitting with the other witnesses? A. No, sir, I was sitting alone.

Q. Didn't you talk——

A. Until my husband came in.

Q. Did you talk to Mr. Barton when you were in there? [167]

A. I talked with Mr. Barton out in the anteroom after we were excluded from the courtroom.

Q. And you both checked on who Smith would be at that time, didn't you?

(Testimony of Helen Burnett.)

A. Yes, at that time.

Q. You didn't——

A. We had already been excluded from the courtroom.

Q. Did you take any other of these M-K checks over that week end? A. Yes, sir, one more.

Q. One other one? A. Yes, sir.

Mr. Nesbett: I believe that is all, your Honor.

Mr. Hepp: I have no questions.

The Court: Mr. Kay.

HELEN BURNETT

testifies as follows on

Cross-Examination

By Mr. Kay:

Q. Mrs. Burnett, you are pretty sure about the time? It was late in the afternoon on Saturday?

A. Yes, it was.

Q. Wouldn't have been any earlier than 4:00 o'clock Saturday afternoon? [168]

A. I don't believe it would have been any earlier probably than 3:30 because I don't usually start working until that time on Saturday afternoon.

Q. No earlier than 3:30 Saturday afternoon?

A. Yes, sir.

Mr. Kay: Thank you.

The Court: Any redirect?

Mr. Plummer: Just one question.

HELEN BURNETT

testifies as follows on

Redirect Examination

By Mr. Plummer:

Q. Mrs. Burnett, is there any doubt in your mind that this is the gentleman that passed the check in your establishment on that date?

Mr. Kay: Object as leading, suggestive, highly improper.

The Court: Objection overruled.

Mr. Plummer: Would you read back the answer. I thought I heard you answer. Would you answer the question?

A. There is no doubt in my mind. That is the gentleman.

Mr. Plummer: Thank you. I have no further questions.

The Court: Any recross? If not, then you may step down. Thanks for coming. You may be excused. [169]

(Thereupon, the witness was excused and left the stand.)

The Court: What is the pleasure of counsel? An hour again. Very well, counsel desire a recess. The court will go into recess for a period of 10 minutes.

(Thereupon, at 4:17 o'clock p.m., following a 10-minute recess, court reconvened and the following proceedings were had:)

The Court: Let the record show all the jurors

are back and present in the box. You may call your next witness.

Mr. Plummer: There are no Government witnesses in the courtroom, are there? (No response.) I ask the bailiff to call Mr. Charles Knuth.

CHARLES KNUTH,

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

The Court: You may proceed, counsel.

By Mr. Plummer:

Q. Would you please state your name, sir?

A. Charles Knuth, K-n-u-t-h.

Q. And would you state your occupation or employment over Labor Day of 1956, sir?

A. Well, I am the owner, operator of Ducale Enterprises. We also have a gift shop that at that time was known as the [170] Hanover Gift Shop.

Q. And you were in direct charge of the Hanover Gift Shop, is that right, as part of your enterprises? A. Correct.

Mr. Plummer: May the record reflect I am having this marked for identification as Plaintiff's Exhibit No. 12 after which I will hand it to counsel.

(Thereupon, the document was handed to defense counsel and thereafter returned to Mr. Plummer.)

Mr. Plummer: May I approach the witness, your Honor?

(Testimony of Charles Knuth.)

The Court: You may.

Q. (By Mr. Plummer): I ask you this, sir: I hand you this document which has been marked for identification only as Plaintiff's Exhibit No. 12 and ask you if you will look at it and tell me what it is, if you know?

A. Well, this is a check that I cashed on or about September first by a man known as—or man that gave me identification as Thomas A. Brown.

Q. Will you look at the front of the check, sir, and tell me what kind of a check it is, the serial number on the check, the amount of the check, and the payee, if you will?

A. Well, the check number is No. 9089. It is pay to the order of Thomas A. Brown under Badge No. 7134 for the net amount of $216.35. [171]

Q. And did this person who purported to be Thomas A. Brown come into your shop and make a purchase? A. That is right, he did.

Q. And after making the purchase did you give him some change from the check?

A. Well, Mr. Brown come in and he expressed a desire to buy a belt buckle. The belt buckle was a gold nugget black diamond with the word Alaska on it. After he selected the merchandise he asked if I would cash a check for him. This is the check that he presented and I asked him for identification. He gave me identification with his picture on it and it appeared to be an M-K identification badge.

Q. And have you since been shown a picture by the police officers of John Walker?

(Testimony of Charles Knuth.)

A. I have.

Q. And is John Walker the same party that cashed that check in your——

A. Yes, he was, and he admitted that he was.

Q. And, sir, I wonder if you will look at the back and see if you endorsed that check and deposited it?

A. Well, as soon as I accepted the check I made a note of it for deposit and my initials are on here.

Q. And was the check honored for payment when it was presented?

A. No, we never have received payment for it. It wasn't honored. [172]

Mr. Plummer: I move the admission of Plaintiff's Exhibit No. 12 for identification only into evidence.

The Court: Is there objection?

Mr. Nesbett: May I ask the witness a question or two, your Honor, concerning the check?

The Court: Yes, you may.

Q. (By Mr. Nesbett): Do you own this store called the Gift Shop? A. I do.

Q. And is this a corporation owning the Gift Shop called Ducale Enterprises?

A. Ducale Enterprises is a corporation which holds various holdings, one of them being the—now called the Safari Gift Shop, at that time known as the Hanover Gift Shop.

Q. Were you behind the counter, so to speak, on the day this check was taken? A. I was.

Q. Where is your shop located?

(Testimony of Charles Knuth.)

A. 235 Fourth Avenue, Anchorage, Alaska.

Q. And are there any other employees on duty there ordinarily?

A. Ordinarily there is my wife and myself and part-time help also, one girl.

Q. Did you take many payroll checks over that Labor Day week end?

A. That particular day there was just that one.

Q. Do you cash many payroll checks in the routine of your [173] business? A. No.

Q. You have talked to Mr. Brown, apparently, haven't you? A. That is right.

Q. Was his name Mr. Brown or Walker?

A. His name was Mr. Brown and Mr. Walker. He apparently had two names.

Q. When did you talk with Mr. Walker?

A. When he identified himself at the Marshal's office.

Q. And how long ago was that?

A. I'd say roughly a year ago.

Q. How long have you been subpoenaed to appear here today?

A. The subpoena that I now have I believe came to me the 10th of this month.

Q. Did you talk with Mr. Plummer concerning this check during the recess just past, in other words, between 4:00 and 4:10?

A. No, I have not.

Q. When did you talk with him last about this check?

(Testimony of Charles Knuth.)

A. I haven't talked to Mr. Plummer about this check at all.

Q. Never? A. No.

Q. Or his assistants, is that right?

A. Yes, Mr. Duggar.

Q. When did that conversation take place?

A. Yesterday afternoon. [174]

Q. Did Mr. Duggar tell you why you were to come here and talk about this check?

A. Well, as near as I understood it he gave everyone, including myself, a briefing of the courtroom in general and procedure.

Q. But about this check in particular, did you talk with Mr. Duggar about that? A. Right.

Mr. Nesbett: Your Honor, I object to the admission of this check on the ground that it is immaterial. It has no relation to any of the defendants, apparently, involved. According to Mr. Plummer's own opening statement the man Brown or Walker, or whoever it was, has entered a plea. I suppose he hasn't been sentenced yet, but it has nothing to do with the trial of this case. I don't know why it's being introduced unless it is to kill time until 5:00 o'clock. Maybe some of Mr. Plummer's other witnesses didn't show up.

Mr. Plummer: We have an abundance of witnesses, your Honor.

The Court: What is the purpose of it?

Mr. Plummer: The reason is, two things, one is to identify the passer which we, of course, said we would do in the opening statement, and the other—

(Testimony of Charles Knuth.)

and this gentleman so far as I know is the only possible man that can do it—is to show he has received no payment from this check.

Mr. Nesbett: Well—— [175]

Mr. Plummer: Indepensable witness, necessary, has to be here for that purpose.

The Court: Well, excepting this though, the defendant has pleaded guilty.

Mr. Plummer: I know.

The Court: So you don't have to prove that.

Mr. Plummer: Well, the check is mentioned in Count 6. There is more than one defendant in Count 6. There is this, defendant Ing, defendant Wright still here. They have not pleaded guilty, in fact they pleaded not guilty. We are trying them right here today.

The Court: Objection overruled. It may be admitted and marked Government's Exhibit No. 12.

Mr. Plummer: I have no further questions of this witness.

The Court: You may cross-examine, Mr. Nesbett.

Mr. Nesbett: May I see the exhibit again.

The Court: While counsel is examining the check would you please tell me which count this refers to, Mr. Plummer?

Mr. Plummer: I am sorry, your Honor. The count involved is Count No. 6.

The Court: Thank you.

Mr. Nesbett: I believe I have no further questions, your Honor.

(Testimony of Charles Knuth.)

The Court: Very well. Mr. Hepp, do you have any questions? [176]

Mr. Hepp: No, I have no questions.

The Court: Mr. Kay.

CHARLES KNUTH

testifies as follows on

Cross-Examination

By Mr. Kay:

Q. What time in the afternoon was it, Mr. Knuth?

A. It was in the evening to the best of my recollection. I'd say possibly about 5:00, 4:00 to 5:00 o'clock. I know it was after the banks closed because I couldn't make vertification any other way.

Q. To the best of your recollection it was 4:00 to 5:00 o'clock on Saturday afternoon?

A. Right.

Mr. Kay: No further questions.

The Court: Very well. Any redirect?

Mr. Plummer: No, your Honor.

The Court: Very well. Mr. Knuth, you may step down. You may be excused. Thanks for coming.

(Thereupon, the witness was excused and left the stand.)

The Court: You may call your next witness.

Mr. Plummer: I would ask that Mr. John P. Harris be called. [177]

JOHN P. HARRIS

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

The Court: You may proceed, counsel.

By Mr. Plummer:

Q. Would you please state your name, sir?

A. John P. Harris.

Q. Would you tell me what your occupation or employment was on or about Labor Day of 1956?

A. I owned and operated the Anchorage Liquor Store, 424 Fourth Avenue.

Q. Were you the owner and operator of the store on that week end, sir, on Labor Day week end 1956? A. What did you say?

Q. Were you the owner and operator of the store at that time? A. Yes, sir.

Q. Were you on duty that day?

A. Yes, sir, up until 4:00 o'clock in the afternoon.

Mr. Hepp: Which day was that? I think you said week end.

Mr. Plummer: Oh.

A. Saturday, September 1, 1956.

Q. (By Mr. Plummer): Saturday, September 1. [178]

Mr. Plummer: May the record reflect that I have had this marked for identification as Plaintiff's Exhibit No. 13 and show it to counsel.

(Testimony of John P. Harris.)

(Thereupon, the document was handed to defense counsel and thereafter returned to Mr. Plummer.)

Mr. Plummer: May I approach the witness, your Honor?

The Court: You may.

Q. (By Mr. Plummer): Mr. Harris, I hand you what has been marked for identification as Plaintiff's Exhibit No. 13. I will ask you to look at it and tell me what it is, if you know, sir?

A. I cashed this check myself at about, around between 7:15 and 8:30 in the evening of September 1, 1956.

Q. Thank you, sir. Would you look at the check —put on your glasses again and look at the check and read what kind of a check it is, the name of the payee, the serial number?

A. The name is Thomas A. Brown and the amount is $216.35.

Q. Will you tell us what kind of check it is?

A. Morrison-Knudsen Company.

Q. Would you be good enough, sir, to look at the right hand side and see if there is a serial number?

A. The serial number is 90—and I think it is 0 —5.

Q. Thank you. Did you make the sale or did you cash this personally?

A. At the same time a girl was working by the

(Testimony of John P. Harris.)

name of Corine [179] Stevens and I cashed the check. She was selling the whiskey. This fellow bought some champagne and whiskey. I cashed the check and I took it over for the whiskey.

Q. And did Mr. Brown or the party calling himself Mr. Brown receive the change?

A. Yes, and he signed the check in front of me.

Q. Now, have you since that time been shown a picture of a gentleman by the name of Joseph Walker by the police? A. By who?

Q. By the name of John Walker by the police?

A. Johnny Walker?

Q. Yes, sir.

Mr. Hepp: I object. I believe that calls for hearsay.

Mr. Plummer: No, there is no hearsay.

Mr. Hepp: Shown a picture of somebody, I believe that——

The Court: Well, the objection will be sustained. Counsel, you may rephrase your question. I think it is objectionable under the law.

Q. (By Mr. Plummer): Do you know now the true identity of the party who signed that check in your presence as Thomas A. Brown?

Mr. Hepp: I object to that.

A. Yes.

Mr. Hepp: As leading and suggestive. I think this witness should testify of his own knowledge and not just state [180] yes or no to the District Attorney's offers. There has not been any founda-

(Testimony of John P. Harris.)

tion laid. We have no opportunity to object as to how he could know these things.

The Court: Objection overruled. He may answer that question.

Q. (By Mr. Plummer): Will you answer the question now, sir? A. What is it about?

Mr. Hepp: I believe he answered it.

Mr. Plummer: Would the reporter read back the answer. I think the answer was yes, is that correct? A. Yes.

Q. (By Mr. Plummer): Who is that gentleman?

A. You mean in the courtroom here?

Q. No, he is not in the courtroom here.

Mr. Kay: Permit him to try——

A. Thomas A. Brown.

Mr. Plummer: May I have just a minute, your Honor?

The Court: Yes, you may.

Mr. Plummer: Your Honor, the hour is late. I would request, due to the lateness of the hour—it is apparent we are going to have to have the defendant Thomas A. Brown here so this man can identify him, the party who purported to be Thomas A. Brown here so he can be identified to this witness, if he can, and may [181] we have a continuance until Monday morning to do that?

The Court: But the other aspects you can conclude with at this time. Why don't you do that, counsel, to save time?

Mr. Plummer: Yes, sir. I appreciate that.

(Testimony of John P. Harris.)

Q. (By Mr. Plummer): Now, what did you do with this check after you took it?

A. I kept it until the, let's see, the 4th day of September to go to the bank. I didn't have only one. I had three checks so I took them all to the bank and I cashed them. I cashed those checks.

Q. Then what happened next, if anything?

Mr. Kay: Your Honor, I had no opportunity to anticipate the answer. I object to that portion of the answer relating to any other checks and ask that it be stricken and ask that the witness be confined to this check.

The Court: The motion is granted and would you confine your remarks to this check only.

A. Well, your Honor, I took those checks at the same time to the bank.

The Court: I appreciate that, but under the rules we are limited to certain things which you can testify to. Now, the only thing we are concerned about for the moment is this check, not what you may have done elsewhere.

A. Yes, I kept it.

The Court: Then just testify about this [182] check.

A. Yes, sir.

The Court: Thank you. You may proceed.

Q. (By Mr. Plummer): Would you tell me what you did with this particular check that you have in your hand?

A. I put it in the safe.

Q. And after that what did you do with it?

(Testimony of John P. Harris.)

A. After that I took it to the bank.

Q. And did you again have occasion to see it after you once took it to the bank?

A. Yes.

Q. And would you tell us when that was and why that was?

A. That was I believe—I have got the date here. I think it was the 5th or 4th, I don't remember. I have got the slip from the bank here. "Thomas A. Brown in the——"

Mr. Hepp: Object to his reading from some extraneous matter. I don't think that is responsive to the question. The question is, when did he next see the check. I think he can either answer he did or didn't.

Mr. Plummer: Mr. Hepp, I will be the one that makes the objection if I don't think the question is responsive. It is for the person examining to make the objection and not for some outsider.

The Court: Objection sustained.

Mr. Hepp: I have a right to object if the answer is [183] not responsive to a question, sir.

The Court: Sorry, counsel, I don't agree with you. You have a right to object to its irrelevancy, incompetency or immateriality only. Only the examing counsel has that right. Objection overruled. You may proceed.

Mr. Hepp: I then renew the objection as being irrelevant, incompetent, and immaterial, what he is reading out of his hand.

The Court: Now, would you please explain to

(Testimony of John P. Harris.)

the Court and to the jury and counsel what you have in your hand there?

The Witness: I have four checks cashed by Thomas A. Brown for $216.35.

The Court: Thank you. Now you may proceed.

Q. (By Mr. Plummer): Have you ever received money for this check that you have in your hand marked Plaintiff's Exhibit No. 13 for identification? Did you ever receive money for that?

A. Receive money?

Q. Yes.

A. The only money I received was from the bank that cashed the check.

Q. Yes. A. That is the only time.

Q. Did anything happen after that?

A. The next thing was this come from the bank. That is what I got left from cashing the check.

Q. Would you tell me—not what that is, but you can refer to [184] it if you want to—but what is it you have in your hand there, sir?

A. You mean from the bank?

Q. Yes.

A. "Reason for return. Described below."

Q. Now, does it refer to this check that you have? A. That is correct, sir.

Q. Would you just read that portion of it?

A. Yes. That is Thomas A. Brown.

Q. And it referred to this same check we are talking about in evidence?

A. Yes, and it is signed by the First National

(Testimony of John P. Harris.)

Bank of Anchorage, Alaska. Morrison-Knudsen Company, Inc.

Mr. Plummer: I have no further questions. I will want to recall this witness, your Honor, Monday morning for the purpose of identification of John Walker. He will be in the courtroom at that time.

The Court: Don't you think, counsel, we could continue at this time, go a little farther on cross-examination, rather than have to recall the man back?

Mr. Hepp: I believe we would prefer that the direct examination be concluded before cross-examination be undertaken.

The Court: Do other counsel join in that?

Mr. Kay: Yes, your Honor.

The Court: Very well. That will be the order. Ladies [185] and gentlemen of the jury: The trial of this case will be continued until next Monday morning at the hour of 10:00 a.m. It will be reconvened in the main courtroom.

As you know, I must instruct you not to discuss this case among yourselves nor are you permitted to let others discuss it with you.

Does the clerk have anything else on her desk at this time?

Deputy Clerk: No, your Honor.

The Court: This court will stand adjourned until tomorrow morning at the hour of 10:00 a.m.

(Thereupon, at 4:45 o'clock p.m., February 20, 1958, court was adjourned to the next morn-

(Testimony of John P. Harris.)

The Court: You may.

Mr. Plummer: I introduce this into evidence. I think counsel have seen it before. I will show it to them again.

The Court: Is there any objection?

Mr. Plummer: May the record likewise reflect, if we have not done so, that this is the check involved in Count 7 of the indictment.

The Court: Thank you. Without objection then it may be admitted and marked Government's Exhibit No. 13.

Mr. Plummer: May I have just a minute, your Honor.

The Court: You may. I point out to the jurors it is a pleasure to be back in the main courtroom after having been so many places.

Mr. Plummer: May I have Exhibit No. 7. May I once more approach the witness, your Honor.

The Court: You may.

Q. (By Mr. Plummer): Would you look at that, Mr. Harris, and tell me what it is, if you know?

A. This is a check cashed by James C. Wood. This is Morrison-Knudsen [191] Company, Inc., General Contractors, Boise, Idaho, pay check No. 90-6 and the amount is $219.46. It's signed by James C. Woods. Signed over by me, Anchorage Liquor Store, John P. Harris.

Q. Did the man endorse that in your presence?

A. Yes, sir, the old—was three people that cashed

(Testimony of John P. Harris.)

those checks. They showed me identification card with a picture and the name on the I.D. card.

Q. Now, have you received any money for that check? A. No, sir.

Q. I wonder if you will look around the courtroom, if you would, and see if you can identify the man that endorsed that check in your presence on that occasion?

A. The man James C. Woods is the man to the right on this side. That is the man there.

Q. Is this the gentleman?

A. Right there, yes, sir.

Mr. Plummer: May the record reflect that I am pointing to Mr. Dewey Taylor. Thank you. May the record also reflect that this is the check involved in Count 18 of the indictment.

The Court: Exhibit No. 7.

Mr. Plummer: May I approach the witness, your Honor.

The Court: You may.

Q. (By Mr. Plummer): I hand you a check, sir, and ask you if you can tell me [192] what it is, if you know?

A. This is a check from Morrison-Knudsen Company, Inc., General Contractors, Boise, Idaho, Pay Check No. 8927. The amount is $217.87 and signed by Theodore Williams, 410 8th Avenue, undersigned by me, Anchorage Liquor Store, John D. Harris.

Q. Did you cash that check?

A. I cashed all those checks myself.

Q. Was it endorsed in your presence?

(Testimony of John P. Harris.)

A. Yes, sir.

Q. Have you ever received any money for it?

A. No, sir.

Q. I ask you, sir, to look around the courtroom and ask you if you see the gentleman that cashed that check?

A. He is the man in the middle of those two, Thomas and Woods. That is with him. Known to me as Theodore Williams.

Mr. Plummer: May the record reflect that I am pointing to Mr. Lemuel Ashley Williams and asking the witness if this is the party that cashed that check on that date?

A. Yes, sir.

Mr. Plummer: I offer this check in evidence. I will show it to counsel. May the record further reflect that this is the check involved in Count 19 of the indictment.

The Court: Very well.

Mr. Plummer: I notice, your Honor, that the defendant Charles E. Smith is sitting in the back of the courtroom, rather [193] than up here. I guess that's permissible if he cares to sit there.

The Court: Yes, as long as he is present in the courtroom. That is proper. Is there objection, counsel?

Mr. Gore: No.

The Court: Without objection then it may be admitted and marked Government's Exhibit No. 14.

Mr. Plummer: I may have asked this witness this question before and if the Court will advise me

(Testimony of John P. Harris.)

I will be glad to strike it, but have you ever been paid for this check? A. No, sir.

Mr. Plummer: I have no further questions of this witness.

The Court: You may cross-examine then.

Mr. Hepp: I don't believe we have any questions, your Honor.

The Court: Mr. Kay?

Mr. Kay: I have no questions of Mr. Harris, your Honor.

The Court: Very well. Mr. Nesbett?

Mr. Nesbett: No questions.

The Court: Very well. Mr. Harris, you may step down.

(Thereupon, the witness was excused and left the stand.)

The Court: You may call your next witness then.

Mr. Plummer: May I call George Wilmoth. Thank you, Mr. Harris. [194]

The Court: May this witness be excused?

Mr. Plummer: As far as the Government is concerned he may be, your Honor.

The Court: Without objection you may be excused then.

GEORGE C. WILMOTH,

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

The Court: You may proceed, Mr. Plummer.

Mr. Plummer: Thank you.

By Mr. Plummer:

Q. Will you state your name, sir?

A. George C. Wilmoth, W-i-l-m-o-t-h.

Q. And your occupation, sir?

A. Salesman.

Q. And for whom?

A. I am self-employed.

Q. What is the name of your establishment, sir?

A. Well, at—I was with Hank's Hardware.

Q. And were you so employed on the Labor Day week end in 1956? A. Yes, sir.

Mr. Plummer: May I approach the witness, your Honor?

The Court: You may. [195]

Q. (By Mr. Plummer): I hand you, sir, an object and ask you if you know what it is?

Mr. Hepp: May it please the Court, I think the prosecution is deviating from the usual practice of serving these articles or items or objects marked for identification and showing them to counsel before any questions are put.

Mr. Plummer: I am doing that on purpose, your Honor, because notwithstanding Mr. Hepp's supposed experience to the contrary, I find that there

(Testimony of George C. Wilmoth.)

is no basis in law, in fact the law is otherwise, that the only time counsel needs to show an object to counsel for inspection is once it has been identified by the witness and there's no, absolutely no basis in law for any other procedure. I submitted it to you the other day because I thought it would speed up the procedure and for that reason I was willing to go along, but I find out it hasn't and I see no reason to deviate from the proper policy at this time.

The Court: Well, since we have an adopted policy during this trial I don't wish it to be any precedent. I concede your wishes to be procedural. I think we should abide by the ruling heretofore made.

Mr. Plummer: May I approach the witness?

The Court: You may do so.

Mr. Plummer: I will have it marked for identification.

The Court: Then, so there won't be any question, that will be marked identification No. 15. As of now I have not [196] received any instructions. Under the rules, and all counsel have been advised, I should receive instructions at the conclusion of the first day of trial. What am I to expect by way of instructions?

Mr. Kay: I have some prepared, your Honor. I thought that possibly in view of the length of the anticipated trial that it would be necessary, but I have them ready. I will submit them.

The Court: I wish you would and then, of

(Testimony of George C. Wilmoth.)

course, as heretofore followed, you would have the right to submit additional instructions.

Mr. Kay: Yes, your Honor.

The Court: Mr. Hepp, are you going to submit instructions to the Court?

Mr. Hepp: Well, I hadn't any idea of the Government's case, your Honor, and I have no way of—to anticipate or prepare and get instructions up. I was unacquainted with this rule and——

The Court: That is why I am calling it to your attention.

Mr. Hepp: Well, I am unable—I have no way of knowing what evidence Mr. Plummer is going to present. I don't know what questions of law are going to be involved in which I would desire the Court to instruct the jury so I am unable to present any at the present time.

The Court: Well, of course, I rather expected that you would anticipate the usual and if you had anything that you desired to be out of the ordinary based upon what you might expect the [197] evidence to be, that you would call that to my attention so I'd have a chance to research it before the last minute.

Mr. Hepp: Well, perhaps the Court would inform me, does the Court give what might be considered the garden variety of instructions of any case as a matter of course?

The Court: Yes, and I thought maybe you might have something in mind special in this case because of your knowledge of the law.

(Testimony of George C. Wilmoth.)

Mr. Hepp: The only instruction that I would have would deal directly and specifically with what might be considered a point of law peculiar to the case that the Government presents. As far as the usual run of instructions, I am quite willing to rely upon the Court.

The Court: Very well.

Mr. Plummer: I have only one that I am planning to submit. It's being typed this morning and I should have it available to give to the Court before this noon.

The Court: I rather anticipate that the Government will be through with their evidence this morning.

Mr. Plummer: I would think a more accurate estimate would be possibly tomorrow evening.

The Court: Thank you. Did you have a point, Mr. Nesbett?

Mr. Nesbett: I want to mention, your Honor, that I am in the same position, although I am aware of the rule. I just can't anticipate outside the usual instructions what I might [198] desire to submit.

The Court: Well, the Court will be understanding, and, on the other hand, I ask counsel to cooperate with the Court so I will have a chance to research your proposed instructions and check it with the law before the last minute because if it's given to me at the last minute then I don't have that opportunity. Thank you. You may proceed.

Mr. Plummer: I would like to advise the Court that nobody except Mr. Kay to date has availed

(Testimony of George C. Wilmoth.)

himself of an opportunity to make an opening statement and there may be something from that that would cause me to have a different attitude on my instructions.

The Court: Very well. Now, that has been shown to counsel, has it not?

Mr. Plummer: This Plaintiff's Exhibit No. 15 has been. I am now showing another check.

The Court: I see.

Mr. Plummer: And I ask that it be marked for identification.

The Court: It may be marked as Plaintiff's Exhibit No. 16 for identification only.

Mr. Plummer: I will show it to counsel, your Honor.

The Court: Very well.

Mr. Plummer: Your Honor, Mr. Kay has brought up a point that I want to call to the Court's attention at this time, is that the three gentlemen sitting behind Mr. Gore and Mr. Ing are [199] witnesses or are potential witnesses in the case.

Mr. Kay: One has already testified.

Mr. Plummer: Yes, and Mr. Taylor has testified. It's necessary because of objection made to the hearsay testimony on the identification for mugshots on Thursday afternoon, to have them present here in the courtroom this morning. As soon as the identification procedures have been outlined they will be removed from the courtroom.

Mr. Kay: That is satisfactory. All I wanted to

(Testimony of George C. Wilmoth.)

point out is that they shouldn't be allowed to sit during other testimony.

The Court: Thank you for calling that to the Court's attention.

Mr. Plummer: And I assure the Court they will be removed as soon as the identification procedures have been completed.

The Court: Very well.

Mr. Plummer: May I approach the witness, your Honor?

The Court: You may.

Q. (By Mr. Plummer): Mr. Wilmoth, I hand you Plaintiff's Exhibit No. 16 for identification and ask you what it is, if you know?

A. Well, it's a very good replica of a Morrison-Knudsen payroll check.

Q. Have you ever seen that check before?

A. Yes. [200]

Q. Where did you see it?

A. In Hank's Hardware.

Q. Did you take that check or cause that check to be cashed over the Labor Day week-end in 1956?

A. No, sir.

Q. Do you know who did? A. Yes.

Q. Will you tell us who did?

A. It was Mrs. Wilma Jones.

Q. And was it done in your presence?

A. I was in the store. I wouldn't testify to the fact that I was standing there and—well, I saw the check given, yes, but I wouldn't say I saw any money change hands.

(Testimony of George C. Wilmoth.)

Q. Yes, sir. Did you see the man who gave the check? A. Yes.

Q. And is he present here in this courtroom?

A. He is.

Q. And would you point him out, if you can?

A. This fellow right over here.

The Court: Refer specifically.

A. Number three there in the——

Q. (By Mr. Plummer): Would this be the man with the plaid jacket on? A. Yes.

Mr. Plummer: Let the record reflect that I am pointing [201] to John Walker.

A. Yes, sir.

Q. Do you know whether or not Hank's Hardware has ever received any money for that check?

Mr. Hepp: I object to that as calling for possible hearsay. There has been no foundation laid that this man would know the answer to that question. He may have heard but we believe that is objectionable.

The Court: Answer only if you know, not if you have heard.

A. I have not heard. I do not know.

Mr. Plummer: May I approach the witness, your Honor?

The Court: Yes.

Mr. Plummer: I offer this into evidence.

The Court: Any objection, counsel?

Mr. Hepp: No.

The Court: Without objection then it may be admitted as Government's Exhibit No. 16.

(Testimony of George C. Wilmoth.)

Mr. Plummer: I have no further questions of this witness.

The Court: You may cross-examine then.

Mr. Nesbett: No cross-examination, your Honor, apparently.

The Court: Very well. Mr. Wilmoth, you may step down. May this witness be excused?

Mr. Plummer: Yes, your Honor. [202]

The Court: Without objection then that will be the order. Thanks for coming.

(Thereupon, the witness was excused and left the stand.)

The Court: You may call your next witness, Mr. Plummer.

Mr. Plummer: I ask that Malue Rewak be called.

MALUE REWAK

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

The Court: Just a moment, please. Mrs. Rewak, will you please remove your coat. Mr. Johnson, I instruct you not to permit any witness to come in that does not have his coat off, please.

By Mr. Plummer:

Q. Will you please state your name?

A. Malue Rewak.

Q. And your occupation?

(Testimony of Malue Rewak.)

A. We have Tom's Radio.

Q. And did you have it during the Labor Day week end in 1956? A. Yes.

Mr. Plummer: I will advise counsel this has already been marked for identification as Plaintiff's Exhibit No. 15 and did you have a chance to inspect it at that time?

Mr. Hepp: Yes. [203]

Mr. Plummer: May I approach the witness?

The Court: You may.

Q. Mrs. Rewak, I hand you an object and ask you if you know what it is?

A. Yes, it's the check that was given to me, you know, on this—I think it was Saturday night.

Q. And would you look at the check and see who the payee is and tell us what kind of a check it is and the check number, if you will?

A. Yes. It's a Morrison-Knudsen check and the number of it is 9073 and down here, as if it was signed by someone from Morrison-Knudsen, it says Guy M. King.

Q. And the payee? A. Thomas A. Brown.

Q. Was this check given to you? A. Yes.

Q. And will you look around the courtroom, Mrs. Rewak, and see if you can see the party that did as a matter of fact cash that check at your place?

A. Yes, in that second row he is the third from the end.

Q. Would that be this gentleman sitting right here? A. Yes.

(Testimony of Malue Rewak.)

Mr. Plummer: May the record reflect that when I asked the question I was pointing to Mr. John Walker.

Q. Now, have you ever received any money for that check? [204] A. No.

Mr. Plummer: May I approach the witness again?

The Court: You may.

Mr. Plummer: The Government offers this in evidence at this time.

The Court: Is there any objection? It may be admitted and then marked Government's Exhibit No. 15.

Mr. Plummer: May the record reflect, your Honor, that this is the check mentioned in Count 9 of the indictment?

The Court: Very well, and how about Exhibit No. 16, counsel?

Mr. Plummer: That is the preceding check.

The Court: It's the preceding check testified to, but succeeding as to the exhibit identification.

Mr. Plummer: May the record reflect, your Honor, that that is the check mentioned in Count 8 of the indictment.

The Court: Thank you.

Mr. Plummer: I have no further questions of this witness.

The Court: You may cross-examine.

Mr. Hepp: No questions.

Mr. Nesbett: I have no cross-examination, your Honor.

(Testimony of Malue Rewak.)

The Court: Thank you. You may be excused, Mrs. Rewak. Thanks for coming.

A. You bet. [205]

The Court: May this witness be excused?

Mr. Plummer: Yes, your Honor.

The Court: Very well, you may be excused permanently.

(Thereupon, the witness was excused and left the stand.)

The Court: Another witness may be called.

Mr. Plummer: Before this witness leaves—Mrs. Rewak, will you stay for just a minute and let this—no, this was in Count 9 of the indictment. Now, actually the last check that was—no, I am fine. May Mr. Roy Johnson be called.

ROY B. JOHNSON, JR.

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

By Mr. Plummer:

Q. Will you please state your name, sir?

A. Roy B. Johnson, Jr.

Q. And would you be good enough, sir, to tell us what your occupation was and who you were employed by over the Labor Day week-end in 1956?

A. I was working at Stratton's Gateway Service Station in Mountain View.

The Court: Pardon me. How do you spell your

(Testimony of Roy B. Johnson, Jr.)

name? S-o-n? A. Yes. [206]

Mr. Plummer: May this be marked for identification.

The Court: It may be marked as Exhibit No. 17 for identification.

Mr. Plummer: May the record reflect that I am showing this to counsel.

The Court: Very well.

Mr. Plummer: May I again approach the witness?

The Court: You may.

Q. (By Mr. Plummer): Mr. Johnson, I hand you what has been marked for identification only as Plaintiff's Exhibit No. 17 and ask you if you will tell me what it is, if you know?

A. That's the check that I cashed on Sunday before Labor Day. The man brought it in and bought an inner tube and I gave him the difference between the price of the inner tube and the check.

Q. And did you also give him the inner tube?

A. Yes, he got the inner tube, too.

Q. And I will ask you, sir, if you will look around the courtroom and tell me if you see that man here in the courtroom today?

A. Yes, he is here.

Q. Would you point him out to me, sir?

A. He is right over there in the gray checked shirt.

Q. Is this the gentleman?

A. Yes, it is. [207]

Mr. Plummer: May the record reflect that when

(Testimony of Roy B. Johnson, Jr.)

I asked the witness the question I was pointing to John Walker.

Q. Would you be good enough, sir, to look at the front of the check and tell me what kind of a check it is and the serial number of the check and the name of the payee?

A. It's a Morrison-Knudsen payroll check, serial number is 9015 and the payee is Thomas A. Brown.

Q. And did John Walker endorse that in your presence as Thomas A. Brown?

A. I don't remember if he endorsed it in my presence or if it was already endorsed.

Q. John Walker is the man who cashed the check? A. Yes, he is.

Q. Do you know whether or not your firm has received money for that check?

A. No, I don't.

Mr. Hepp: I object to that. I don't know there is any showing that this witness——

The Court: Only if he knows.

Mr. Plummer: I think he has already answered he doesn't know, your Honor.

The Court: All right. Very well.

Mr. Plummer: I offer this in evidence at this time.

The Court: Any objection? Without objection it may be admitted then as Government's Exhibit No. 17. [208]

Mr. Plummer: May the record reflect, your Honor, that this is the check mentioned in Count 10 of the indictment.

(Testimony of Roy B. Johnson, Jr.)

The Court: Very well.

Mr. Plummer: I have no further questions of this witness.

The Court: You may cross-examine.

Mr. Kay: I have just a question, your Honor.

ROY B. JOHNSON, JR.

testifies as follows on

Cross-Examination

By Mr. Kay:

Q. You are Robert W. Stratton, Jr., aren't you?

A. No, I am not.

Q. I am sorry. I thought when you came in you identified yourself as Robert W. Stratton, Jr.

The Court: No, Roy B. Johnson.

Mr. Kay: I am sorry.

Q. You are not the owner of Stratton's Gateway Service? A. No.

The Court: Any other cross? Very well. You may step down, Mr. Johnson. May this witness be excused?

Mr. Plummer: As far as the Government is concerned he may be.

The Court: Without objection you may be permanently [209] excused. Thanks for coming, Mr. Johnson.

(Thereupon, the witness was excused and left the stand.)

Mr. Plummer: I ask that Jeanne Beth be called.

JEANNE BETH

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

The Court: You may proceed, counsel.

By Mr. Plummer:

Q. Will you please state your name?

A. Jeanne Beth.

Q. J-e-a-n-n-e and the Beth is B-e-t-h, is that correct? A. Yes.

Q. Would you tell us what your employment was over the Labor Day week-end in 1956?

A. I was employed as combination secretary-clerk of McKay's Hardware.

Q. I wonder, Miss Beth, if you would move the microphone closer to you and talk into the microphone and would you repeat your last answer, please?

A. I was employed at McKay's Hardware as combination secretary and clerk.

Q. And were you on duty over that Labor Day week-end in the store? [210]

A. I was, yes.

Mr. Plummer: Will you mark this for identification.

The Court: That's number 19.

Mr. Plummer: May the record reflect I am showing it to counsel.

The Court: You may do so.

(Testimony of Jeanne Beth.)

Deputy Clerk: I mismarked it. It should be 18.

The Court: Well, let the record now stand as it is and mark it 17. Would that be proper?

Deputy Clerk: No, it's 18.

The Court: Have we used 17? I don't have it.

Mr. Kay: Roy B. Johnson identified that.

The Court: I am sorry, that was Number 18 I think.

Mr. Plummer: If we could get the check.

The Court: Well, he has 17 right here. I am in error.

Mr. Plummer: Yes, this was 17, your Honor.

The Court: I am in error. Very well, then this one may be marked as Number 18 for identification.

Mr. Plummer: May the record show that I am giving it back to the Clerk or in-court Deputy for correction and it is now being marked Plaintiff's Exhibit No. 18 for identification only.

The Court: Very well.

Mr. Plummer: Does anybody want to look at it further over here? [211]

Mr. Gore: No.

Mr. Plummer: May I approach the witness, your Honor?

The Court: You may.

Q. (By Mr. Plummer): Miss Beth, I hand you an object which has been marked for identification only as Plaintiff's Exhibit No. 18 and ask you to look at it and tell me what it is, if you know?

(Testimony of Jeanne Beth.)

A. It looks like a Morrison-Knudsen payroll check.

Q. And do you see a serial number on there?

A. Yes, number 9057.

Q. And do you see the name of the payee from the face of the check? A. Thomas A. Brown.

Q. I wonder if you would be good enough to look at the rear of the check. Does it bear an endorsement on it? A. Thomas A. Brown.

Q. And I wonder if you would be good enough—first, was that endorsement made in your presence?

A. Yes, it was.

Q. I wonder if you would be good enough to look around the courtroom and tell me, if you can, or if you see the gentleman that made the endorsement on that day?

A. The gentleman in the plaid shirt sitting over there.

Q. Would that be this gentleman?

A. That is correct [212]

Mr. Plummer: May the record reflect that when I asked the question I was pointing to Mr. John Walker.

Q. Do you know, and I will ask you to reply only if you know from your own knowledge, if the firm for which you were working received any money for this check?

A. Not to my knowledge, no.

Mr. Plummer: May I approach the witness, your Honor?

(Testimony of Jeanne Beth.)

The Court: You may. I now introduce this into evidence as Plaintiff's Exhibit No. 18.

The Court: Is there any objection? Hearing none it may be admitted.

Mr. Plummer: May the record reflect, your Honor, that Plaintiff's Exhibit 18 is the check which is mentioned in Count 11 of the indictment.

The Court: Thank you.

Mr. Plummer: I have no further questions of this witness.

The Court: Is there any cross-examination?

Mr. Kay: Just a question or two, your Honor.

JEANNE BETH

testifies as follows on:

Cross-Examination

By Mr. Kay:

Q. Miss Beth, do you know when on the week-end that check was [213] cashed, Saturday, Sunday, when?

A. No, I can't state exactly what date it was cashed, no.

Q. The store was open on Sunday?

A. We were open on Sunday always and Labor Day also.

Q. You replied in response to a question by Mr. Plummer that you didn't know or that no money had been received on this check to your knowledge?

A. That is correct.

Q. Would you know or would someone else in

(Testimony of Jeanne Beth.)

the store be more in a position to know? Do you make the deposits, in other words?

A. I make the deposits, yes, although I couldn't say whether anyone else had been approached. He asked me if I know of anyone that had and I told him no because I don't know of any.

Q. You just don't know whether any money was received for the check?

A. That is correct.

Q. When asked to identify Mr.—did anyone point out to you prior to coming into the courtroom where Mr. Walker would probably be sitting?

A. No, only that Mr. Walker would be in the courtroom.

Q. Didn't mention that he would have a plaid shirt on or be sitting over on this side?

A. No, definitely not. [214]

Q. You just happened to be—look right over here? A. Yes, I did.

Mr. Kay: That's all.

The Court: Any redirect?

Mr. Plummer: Yes.

JEANNE BETH

testifies as follows on

Redirect Examination

By Mr. Plummer:

Q. Would you tell us, Miss Beth, the circumstances of which the check was cashed?

A. He came into our store and I happened to be

(Testimony of Jeanne Beth.)

the one that waited on him and he bought a reel, a spinning reel, in our store and cashed the check and as I personally know quite a few Morrison-Knudsen men I glanced up at him to see if I could acknowledge who he was and I remember commenting to the fact, "You work for Morrison-Knudsen also? I know quite a few people who do." That is how come I remember him distinctly because I did know so many Morrison-Knudsen boys.

Q. There is no doubt in your mind that this is the gentleman? A. No doubt whatsoever.

Mr. Plummer: Fine. I have no further questions.

The Court: Any recross?

Mr. Kay: No. [215]

The Court: Very well. You may step down.

Mr. Plummer: Did I advise the court that this was the check mentioned in Count 11 of the indictment?

The Court: Yes, you did. Thank you. May this witness be excused without objection.

(Thereupon, the witness was excused and left the stand.)

Mr. Plummer: May William Gordon be called, your Honor.

WILLIAM GORDON

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

By Mr. Plummer:

Q. Would you please state your name, sir?

A. William J. Gordon.

Q. And what is your occupation?

A. Accounting in the Railroad.

Q. And did you formerly have a part time job?

A. Yes.

Q. And did you have this part time job over the Labor Day week-end in 1956? A. I did.

Q. Would you be good enough, sir, to tell us what that job was?

A. Working in the liquor store, clerk. [216]

Q. And at what liquor store? A. Davis.

Q. Davis Liquor Store? A. Yes.

Mr. Plummer: May I have Plaintiff's Exhibit No. 2. It's already been introduced. May I approach the witness?

The Court: You may.

Q. (By Mr. Plummer): I hand you what has been marked as Plaintiff's Exhibit No. 2 and ask you what it is, if you know?

A. It's the check I accepted on that date.

Q. Over the Labor Day week-end in 1956?

A. That is correct.

Q. I wonder if you will look around the court-

(Testimony of William Gordon.)

room and tell me, if you know, if this party that you took it from is in the courtroom at this time?

A. No, I don't see him.

Mr. Plummer: Very good, sir. I have no further questions of this witness.

The Court: Any cross? Very well. You may step down, Mr. Gordon. You may be excused. Thanks for coming—without objection.

(Thereupon, the witness was excused and left the stand.)

The Court: You may call your next witness.

Mr. Plummer: May I call Darlene Rasmussen. [217]

DARLENE RASMUSSEN

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

By Mr. Plummer:

Q. Will you please state your name?

A. Darlene L. Rasmussen.

The Court: How do you spell that last name, please?

A. R-a-s-m-u-s-s-e-n.

Q. Would you be good enough to tell us where you were employed, if in fact you were employed, over the Labor Day week-end in 1956?

A. The Record Shop.

Mr. Plummer: May I have Plaintiff's Exhibit No. 4.

(Testimony of Darlene Rasmussen.)

The Court: It may be marked as Exhibit No. 19 for identification.

Mr. Plummer: This has already been introduced as Plaintiff's Exhibit No. 4.

The Court: I thought you asked to have it marked.

Mr. Plummer: No. I am sorry.

The Court: Thank you.

Mr. Plummer: May I approach the witness?

The Court: You may. [218]

Q. (By Mr. Plummer): I hand you, Miss Rasmussen, what has been admitted into evidence as Plaintiff's Exhibit No. 4 and ask you what it is, if you know?

A. This is the check that I took at the Record Shop while working there over the Labor Day weekend.

Q. I wonder, Miss Rasmussen, if you will be good enough to look around the courtroom and tell me whether or not you see the man that passed that check to you on that occasion?

A. Yes, sir.

Q. Will you be good enough to point him out?

A. It's the gentleman in the beige suit, wine tie, in the second row.

Mr. Plummer: Let the record reflect that I am pointing to Mr. Dewey Taylor as I ask this question, is this the gentleman?

A. Yes, it is, sir.

Mr. Plummer: I have no further questions of this witness.

(Testimony of Darlene Rasmussen.)

The Court: Any cross-examination? You may step down, Miss Rasmussen. Thanks for coming. You may be excused without objection.

(Thereupon, the witness was excused and left the stand.)

Mr. Plummer: May the record reflect that this is the check mentioned in Count 14 of the indictment.

The Court: Very well.

Mr. Plummer: May I ask that Mr. George Cox be called. [219]

GEORGE COX

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

The Court: You may proceed, counsel.

By Mr. Plummer:

Q. Will you please state your name, sir?

A. George Cox.

Q. And will you be good enough to tell us what your employment was over the Labor Day week-end in 1956?

A. I was a partner in City Service.

Q. What was the name of your establishment?

A. City Service.

Q. Thank you.

(Testimony of George Cox.)

Mr. Plummer: May I have Plaintiff's Exhibit No. 5. May I have just a minute, your Honor.

The Court: You may. Mr. Plummer, I think you will find that you were—just reverse the identification. Number 3 is Tom's T.V. and Number 4 is City Service. They are so marked and that is the way I have them listed.

Mr. Plummer: Fine. Would the record then reflect that Exhibit No. 3 is Tom's Radio.

The Court: It so does.

Mr. Plummer: Fine. Thank you. May I have Plaintiff's [220] Exhibit 4. May I have just a minute, your Honor.

The Court: You may.

Mr. Plummer: May I approach the witness, your Honor?

The Court: You may.

Q. (By Mr. Plummer): Mr. Cox, I hand you what has been admitted as Plaintiff's Exhibit No. 4 and ask you to look at it and tell me what it is, if you know.

A. It's a check I took on Sunday before Labor Day for $219.46 on Morrison-Knudsen Company, Number 8977.

Q. And who is the payee?

A. Signed by James C. Woods.

Q. And did the man sign it in your presence?

A. Yes, sir.

Q. Did he display identification?

A. Yes, sir.

Q. And I wonder if you would be good enough,

(Testimony of George Cox.)

sir, to look around the courtroom and tell me where this party is if he happens to be in the courtroom?

A. First seat with light suit with white handkerchief in his pocket.

Q. May the record reflect that I am pointing to Mr. Dewey Taylor when I ask this question, is this the gentleman that passed the check to you on that occasion? A. Yes, sir. [221]

Q. Have you ever received any money for this check? A. No, sir.

Mr. Plummer: I have no further questions of this witness.

The Court: You may cross-examine.

Mr. Nesbett: No cross.

The Court: Very well. You may step down.

Mr. Kay: Your Honor, I am mixed up on the exhibits. I thought Exhibit No. 4 had just been identified and testified to by Darlene Rasmussen, the Record Shop.

The Court: Inadvertently that was Number 3.

Mr. Kay: Which exhibit was she actually identifying, 4 or 3?

The Court: I can't tell you.

Mr. Kay: The record shows she identified and testified concerning Exhibit 4. Now Mr. Cox testifies and identifies the same check.

Mr. Plummer: I would request of the court permission to recall Mrs. Rasmussen and recheck the record.

The Court: Without objection you may do so.

Mr. Cox, you may step down and without objection this witness may be excused.

(Thereupon, the witness was excused and left the stand.)

Mr. Plummer: May I have just a minute, your Honor.

The Court: Yes. [222]

The Court: Are you sending——

Mr. Plummer: For Miss Rasmussen. We will proceed with some other count.

The Court: Very well.

Mr. Kay: Could we take the 11:00 o'clock recess, your Honor.

The Court: Any objection?

Mr. Plummer: No.

The Court: Ladies and gentlemen of the jury—no movement in the courtroom, please—you are requested to use the restrooms upstairs, not to use the hall whatsoever. That will be the order from this date forward. We have had to deviate from that because of the fact we have been holding court in the American Legion Hall and Elks Hall, but I instruct you not to communicate with anybody in the corridors whatsoever. The court will now go into recess for a period of 10 minutes.

(Whereupon, at 11:10 o'clock a.m., following a 10-minute recess, court reconvened and the following proceedings were had:)

The Court: Let the record show all the jurors

are back and present in the box. You may call your next witness.

Mr. Plummer: May I ask leave to recall Darlene Rasmussen. [223]

DARLENE RASMUSSEN

recalled as a witness for and on behalf of the Government, and having previously been duly sworn, testifies as follows on

Direct Examination

Mr. Plummer: May the record reflect, your Honor, that this is the same Darlene Rasmussen who appeared as a witness in this case a few minutes ago. She was called at that time and sworn. May I remind her now that she is still under oath.

The Court: Very well. You may proceed.

Mr. Plummer: May I approach the witness, your Honor?

The Court: You may.

By Mr. Plummer:

Q. I hand you what has been marked and admitted as Plaintiff's Exhibit No. 3 in this case. I think through inadvertence the record became confused as to whether or not this was the check that was accepted by you on the Labor Day week-end. Would you look at the check and tell us whether or not it is?

A. Yes, sir, I am positive this is the one. It has my initials on it and also has "For Deposit Only to the First National Bank for the Record Shop and

(Testimony of Darlene Rasmussen.)

Radio T.V. Center," so I am positive it is the check.

Q. And would you look at the front of the check and you'll see a little yellow sticker on there. Would you see what it says?

A. Plaintiff's Exhibit No. 3, I believe that is what it stands for, [224] and the number is 3772.

Q. And would you give me the serial number of the check?

A. It is pay check number 8973.

Q. And that is the one that you took?

A. Yes, it is, sir. It has my initials on it.

Mr. Plummer: May the record reflect that this is the check listed in Count No. 14 of the indictment.

The Court: Without objection you may do so.

Mr. Plummer: I have no further questions of this witness.

The Court: Very well. Is there any cross-examination?

DARLENE RASMUSSEN

testifies as follows on

Cross-Examination

By Mr. Hepp:

Q. It seems to me that, as I recall your other testimony, you were very sure that the check you looked at before was the one that you took?

A. Well, I—pardon?

Q. Could you have been in error then?

A. Yes, I was, sir. I was in error. I was looking on the back for our deposit stamp, but in the con-

(Testimony of Darlene Rasmussen.)

fusion there was no—so many stamps on the back, you will notice, I couldn't find it and this is the right check. [225]

Q. But you were willing to testify under oath before that that was the check?

A. Well, I was confused, sir. I am sorry.

Mr. Hepp: I have no further questions.

The Court: Any further cross? Very well.

Q. (By Mr. Hepp): There is no doubt?

A. No, sir. This is my own handwriting in the left hand corner and this is my own initials. I am very sure.

Q. Was there any doubt before when you testified that that was the check?

A. Well, I was hunting on the back for our deposit stamp, but I did not deposit the check myself, thereby I did not know if it had the rubber stamp on it or not.

Q. I repeat my question. Was there any doubt when you testified before that that was the check that you had deposited?

A. Well, as I say, I was hunting for the rubber stamp mark but I did not find it. It was for the same amount, $219.00, and I was quite sure that it was the one then.

Q. There was no doubt in your mind then?

A. At the present time, no. After I got back to the office I was wondering.

Q. I am referring to the first check. Was there any doubt?

Mr. Plummer: Will you please let the witness

(Testimony of Darlene Rasmussen.)

answer the question. You asked her a question. Let her answer before [226] you break in, please.

The Court: You may proceed.

Q. (By Mr. Hepp): I just repeat my original question. Was there any doubt in your mind when you testified before under oath that that was the check that you couldn't find your initials on?

A. No, at the time there was no doubt. I thought it was the one.

Q. But you were wrong though?

A. Yes, I was.

The Court: Very well. Any further questions?

Mr. Hepp: No, your Honor.

The Court: You may step down then. You may now be excused, Miss Rasmussen.

Mr. Plummer: Thank you. We will promise not to have you come back again.

(Thereupon, the witness was excused and left the stand.)

The Court: You may call your next witness.

Mr. Plummer: Benny Leonard.

BENNY LEONARD

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

The Court: You may proceed, counsel. [227]

By Mr. Plummer:

Q. Will you please state your name, sir?

A. Benny Leonard.

(Testimony of Benny Leonard.)

Q. And do you have a certain business enterprise around town here, sir?

A. Yes, I have Leonard's Variety.

Q. And where is that located?

A. 418 Fourth Avenue.

Q. And were you the owner of this establishment on the Labor Day week-end in 1956?

A. Yes, I was.

Mr. Plummer: May I approach the witness, your Honor?

The Court: You may.

Q. I hand you, Mr. Leonard, what has been marked for identification and admitted as Plaintiff's Exhibit No. 5 and ask you to look it over and tell me what it is, if you know?

A. It is a check I received.

Q. And when did you receive it, if you know? Was it over the Labor Day week end?

A. Yes, I believe it was Monday.

Q. And did you ever receive any money for that check? A. No.

Q. And——

A. I've got a slip here from——

Q. No, your answer is sufficient, sir. We can't tell what [228] somebody else may have told you. Just answer the question and you have. Would you look at the back of the check, Mr. Leonard, and does it contain an endorsement? A. Yes.

Q. And what is the name of the endorsement?

A. Well, the first one is James C. Woods.

Q. Fine, and I wonder if you would look around the courtroom and find out—tell me if the party

(Testimony of Benny Leonard.)

that signed that as James C. Woods is present here in court, if you know?

A. Yes. It's the second man from the left.

Q. Would you point him out to me, sir? May the record reflect that I am pointing to Mr. Dewey Taylor and ask you if this is the gentleman that passed the check? A. Yes.

Mr. Plummer: I have no further questions.

The Court: You may cross-examine.

Mr. Nesbett: No questions, your Honor.

The Court: Very well. You may step down, Mr. Leonard. Thanks for coming. Without objection you may be excused.

(Thereupon, the witness was excused and left the stand.)

The Court: You may call your next witness.

Mr. Plummer: Yes, your Honor. May I call Mr. Joe Turgeon.

JOSEPH TURGEON,

called as a witness for and on behalf of the Government, and being [229] first duly sworn, testifies as follows on

Direct Examination

The Court: You may proceed, counsel.

By Mr. Plummer:

Q. Will you please state your name, sir?

A. Joseph Turgeon.

The Court: How do you spell the last name, please?

(Testimony of Joseph Turgeon.)

A. T-u-r-g-e-o-n.

The Court: Thank you.

Q. (By Mr. Plummer): Did you have employment in the Anchorage area over the Labor Day week end in 1956, sir? A. I did, sir.

Q. Would you be good enough to tell us where you worked?

A. At Stewart's Photo.

Mr. Plummer: May I have Plaintiff's Exhibit 6. May I approach the witness, your Honor?

The Court: You may.

Q. Mr. Turgeon, I hand you what has been admitted into evidence as Plaintiff's Exhibit No. 6 and ask you to examine it carefully and tell me what it is, if you know?

A. Yes, it is, sir. It's a check I accepted for a purchase of a camera.

Q. And will you look at the reverse side of the check, sir, and is there an endorsement on there? [230] A. Yes, there is, sir.

Q. Will you tell me the name of the first endorser on there? A. James C. Woods.

Q. I wonder if you would be good enough to look around the courtroom to see if you find the person who purported to be James C. Woods on that occasion? A. Yes, I do.

Q. And would you point him out?

A. He is the third man from the right.

Q. May the record reflect as I am asking this question that I am pointing to Mr. Dewey Taylor, is this the gentleman that passed the check and

(Testimony of Joseph Turgeon.)

signed the name James C. Woods?

A. Yes, sir.

Mr. Plummer: I have no further questions, your Honor.

The Court: You may cross-examine. Very well, then you may step down and without objection you may be excused. Thanks for coming.

(Thereupon, the witness was excused and left the stand.)

Mr. Plummer: Now, may we call Mrs. Jurgelite, please.

GERTRUDE JURGELITE

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

The Court: You may proceed, counsel. [231]

By Mr. Plummer:

Q. Will you please state your name?

A. Gertrude Jurgelite.

The Court: J-u-r-g-e-l-i-t-e?

A. Yes.

Q. Mrs. Jurgelite, do you and your husband have a business enterprise any place? A. Yes.

Q. What is it?

A. Mile 113, Glenn Highway, Sheep Mountain Lodge.

Q. Were you the owners and operators of that establishment over the Labor Day week end of 1956? A. We were.

(Testimony of Gertrude Jurgelite.)

Mr. Plummer: May I have this marked for identification?

The Court: It's marked as Number 19 now, is that correct?

Deputy Clerk: Yes, your Honor.

Mr. Plummer: May the record reflect I am showing it to counsel.

The Court: You may do so without objection.

Mr. Plummer: The counsel has mentioned to me that there is an item in here that is not part of the check. I will ask—I will hand it to the in-court deputy and ask that you remove this since it has been marked for identification.

The Court: Without objection that will be the order. [232]

Mr. Plummer: May counsel approach the witness, your Honor?

The Court: You may.

Q. (By Mr. Plummer): Mrs. Jurgelite, I hand you what has been marked for identification only as Plaintiff's Exhibit No. 19. I ask that you look it over and tell me what it is after you have looked it over, if you know?

A. That's the check that the taxi driver gave me.

Q. And when did he give it to you?

A. Oh, it was that week end. I don't remember the exact date. It was early in the morning.

Q. Of what year? A. '56.

Q. And was it at your establishment up at Sheep Mountain? A. What?

(Testimony of Gertrude Jurgelite.)

Q. Was it at your establishment at Sheep Mountain? A. Yes.

Q. Will you tell us the circumstances of this transaction, if you recall?

A. Well, two men came into the lodge about 5:00 or 6:30 in the morning, it was early in the morning, and one was a man by the name of Russell Hobbs that had been in there a couple of times. He owns a taxi stand or taxi or something, and this other man was with him and he bought a tire, a used tire and [233] glass of milk and Russell Hobbs gave me this check. It was—he said it was this other man's check, Theodore Williams.

Q. Was it endorsed at the time he gave it to you? A. Yes, it was already endorsed.

Q. And was the man present in the establishment whose signature it purported to be on the endorsement?

A. The white man—I mean, Theodore——

Q. Yes? A. Yes.

Q. And I wonder if you would be good enough to look around the courtroom and tell me if that man is present here in court?

A. I saw him over in the jail in November, but I can't see him—oh, yes, I can sir. It's the second gentleman between the two colored men.

Q. May the record reflect that when I am asking this question I am pointing to Mr. Lemuel Ashley Williams, is this the gentleman whose signature purports to be on the back of the check?

A. Yes.

(Testimony of Gertrude Jurgelite.)

Mr. Plummer: May I aproach the witness, your Honor?

The Court: You may.

Mr. Plummer: I now offer this in evidence.

The Court: Is there any objection. Without objection it may be admitted then and marked Government's Exhibit No. 19.

Mr. Plummer: I have no further questions of this [234] witness.

The Court: You may cross-examine then, counsel.

GERTRUDE JURGELITE

testifies as follows on

Cross-Examination

By Mr. Kay:

Q. As I get it, your testimony, Mrs. Jurgelite, it was this Russell Hobbs that actually handed you the check?

A. Yes, he actually handed it to me. That is true.

Q. And he had it in his possession at that time?

A. He had it in his possession.

Q. Mr. Williams just standing there at the time?

A. Well, he agreed that it was his check.

Q. I see. And that he had given it to Hobbs?

A. Yes.

Q. So Hobbs is the one who passed it to you?

A. That's right.

Mr. Kay: I have no further questions.

GERTRUDE JURGELITE

testifies as follows on

Redirect Examination

By Mr. Plummer:

Q. He did so in the presence of this gentleman who you have [235] identified as——

A. Yes.

Q. They were both standing there?

A. They were both there, yes.

Mr. Plummer: I have no further questions.

The Court: Very well. You may step down, Mrs. Jurgelite. Thanks for coming. This witness may be excused without objection.

(Thereupon, the witness was excused and left the stand.)

The Court: Could you refer to the count?

Mr. Plummer: May the record reflect that this is Count 20 of the indictment, your Honor.

The Court: Thank you. You may call your next witness.

Mr. Plummer: May I have just a minute, your Honor, to check the checks.

The Court: Very well.

Mr. Plummer: I ask that the bailiff call—first, I ask that Mr. Williams, Mr. Taylor, and Mr. Wright be removed from the courtroom.

The Court: Any objection?

Mr. Kay: No.

The Court: That is Mr. Taylor and Mr. Wil-

liams and the other gentleman, you may be excused.

(Thereupon, Mr. Williams, Mr. Taylor, and Mr. Wright left the courtroom.)

Mr. Plummer: I ask that the bailiff then [236] call Mr. Edward Harkabus.

EDWARD J. HARKABUS

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

By Mr. Plummer:

Q. Would you please state your name, sir?

A. Edward J. Harkabus, H-a-r-k-a-b-u-s.

Q. You anticipated my next question.

The Court: Thank you; that's very important to the Court Reporter and In-Court Deputy as well as the Court.

Q. (By Mr. Plummer): Where do you live, sir? A. Fairbanks, Alaska.

Q. Now, do you know the defendant in this case, Charles Edward Smith? A. I do.

Q. Now, did you have the occasion to see the defendant Charles Edward Smith on March 17, 1957?

A. I did.

Q. And would you be good enough to tell us where you saw him?

A. King County Jail in Seattle, Washington.

Q. And do you recall about what time of the day it was?

(Testimony of Edward J. Harkabus.)

A. Roughly around two—two-thirty in the [237] afternoon.

Q. And do you recall what day of the week that was? A. That was on a Sunday.

Q. And did you see him by yourself, or was there somebody with you when you saw him, or somebody with you?

A. I was present, Mr. Smith was present, Lt. William Trafton of the Territorial Police and Chief —or, excuse me, Special Deputy U. S. Marshal, Ted Pass was also present.

Q. And was there anybody else present at the time? A. For part of the time, yes.

Q. Did you have occasion to interview him on that occasion? A. Yes, I did.

Q. And did he make any statements to you regarding his participation of the Morrison-Knudsen check swindle over the Labor Day week end in 1956?

Mr. Nesbett: I will object to that and ask permission of the Court to approach the bench.

The Court: Motion granted.

(Thereupon, all counsel approached the bench and the following proceedings were had out of the hearing of the jury:)

Mr. Nesbett: Your Honor, I object to questioning along these lines, while the defendant was in custody at the time. I notice an attempt to introduce the statement, after the answering of this question, I assume, and the statement would be the

(Testimony of Edward J. Harkabus.)

best evidence, and I want to hear him on the statement because I have [238] reason to believe, I have strong reason to believe that the statement was taken under grounds that would cause it to be inadmissible on the ground coercion was taken before he was arraigned and on a promise——

The Court: Very well, the Court then in conformance with the Rules and Practice will excuse the jury and will try the admissibility or inadmissibility of the statement.

Mr. Nesbett: Could the hearing be held in chambers, or with the spectators out of the courtroom? I know that it's very difficult, as your Honor realizes, by not keeping the jurors from the hallway, it will not keep from them any of the proceedings and——

The Court: Well, I am concerned about excluding all spectators on the constitutional ground of a public trial.

Mr. Hepp: If I may say a word, as far as the defendant Wright is concerned, I will waive his rights. In fact, he will personally waive his right to have a public hearing in the sense that that word is used in connection with the hearing on the statement.

The Court: Will you waive that, also, as to your defendant, Smith?

Mr. Nesbett: Yes.

The Court: Mr. Kay?

Mr. Kay: Yes, we will waive the constitutional provision. I do not feel that, along with Mr. Nes-

(Testimony of Edward J. Harkabus.)

bett, no matter how hard [239] the jury tried, I am sure they're all conscientious, it's hard, very hard, for them not to hear gossip and for that reason, I would feel it would be wise to excuse the jurors at this time, so it can be done.

Mr. Plummer: With all due respect to counsel, if it's a constitutional right to have a fair and public trial, I do not think they can waive it adequately.

Mr. Hepp: I submit to the Court, the defendant can waive any right that is his right.

Mr. Plummer: I am sure the cases will show otherwise.

Mr. Nesbett: I am informed, your Honor, that Judge Forbes occasionally holds these in chambers and that is all I know is just hearsay on it. Did you tell me that?

Mr. Hepp: I have never attended a chambers hearing on this question, however——

The Court: Well, I would not, regardless of Judge Forbes or anybody else, I would not want to hold it in chambers.

Mr. Kay: I'd rather have it in open court, too. Facilities are better, including the Court Reporter, and I think it would be crowded in chambers anyway because you have all the defendants there and as of right, they'd have to be there.

The Court: Yes, as of right. Mr. Plummer, it appears to the Court—now I'd like to have each one of the defendants come to the bench and state that

(Testimony of Edward J. Harkabus.)

they will waive their right to a public trial; then, if that is done—— [240]

(Thereupon, all Defendants approached the bench.)

The Court: Mr. Wright, your counsel, Mr. Hepp, states that on this proceeding to determine the admissibility or inadmissibility of the statement of one Mr. Smith, that you will waive your right to a public trial and we will exclude all the spectators for this purpose only; and you understand Mr. Wright, if this is done, you could not use this matter on appeal in the event that it becomes necessary for you to appeal, or if you do appeal?

Mr. Wright: What does my counsel think of it?

Mr. Hepp: Yes, waive your right.

Mr. Wright: Yes, I will.

Mr. Ing: I have the instruction and I will waive that right.

The Court: You understand you couldn't use that on appeal?

Mr. Ing: Yes.

The Court: Mr. Smith, your counsel has indicated that you will waive the right to a public trial for a portion of the case to determine the admissibility or inadmissibility of your statement. Now, I am pointing out to you if you waive this right then you cannot use it as a ground for appeal, you understand that, in the event you desire to appeal?

Mr. Smith: Yes.

(Testimony of Edward J. Harkabus.)

The Court: And you do waive that then? [241]

Mr. Smith: Yes.

The Court: Very well, then. Thank you.

(Thereupon, all counsel and defendants returned to their respective seats, and the following proceedings were had in the presence of the jury:)

The Court: For the reasons stated at the bench, the jurors may be excused to go to their jury room and the Court at this time will have to excuse all people in the general courtroom. The only people allowed in the general courtroom will be the defendants, their counsel, and of course, none of these defendants (indicating defendants Walker, Taylor, and Williams)—they're all under bond, aren't they? And, of course, Mr. Laird may stay in conformance with the prior rule.

Very well, ladies and gentlemen of the jury, you may be excused to go to the jury room. I don't know how long it will take. We may complete it before lunch; we may not. I can't assure you at this time and in the meantime, the Court expects all spectators in the courtroom to absent themselves from the courtroom and the bailiff is instructed to keep all visitors from coming in on this facet of the case.

(Thereupon, the jurors were excused to go to the jury room and the spectators retired from the courtroom, after which the following proceedings were had:)

(Testimony of Edward J. Harkabus.)

The Court: Let the record show all spectators and jurors have been excluded from the courtroom and the only people present are the three defendants, their counsel and the District Attorney, Mr. Laird—or, Sgt. Laird of the Territorial Police, and the court personnel, plus the witness, Mr. Harkabus. You may proceed.

Q. (By Mr. Plummer): Mr. Harkabus, what was your employment over the Labor Day week end of 19— or——

The Court: Pardon me, I am sure counsel will not object if I ask for my Law Clerk to come in during this hearing?

Mr. Kay: No, that will be fine.

The Court: Mr. Gearlings may come in, Mr. Johnson. Now, you may proceed.

Q. (By Mr. Plummer): Would you be good enough, Mr. Harkabus, to tell me what your employment was on March 17, 1957?

A. I was Special Agent with the National Board of Fire Underwriters.

Q. You were not employed by the Government?

A. I was not.

Q. Now, I will ask you if whether you saw the defendant on March 17, 1957, in the jail in Seattle in the company with—did you say Smith, Pass and Trafton, and yourself?

A. That is right. [243]

Q. Now, did you have an interview with him on that occasion? A. I did.

Q. And did he, during the course of your inter-

(Testimony of Edward J. Harkabus.)

view, did you mention the Morrison-Knudsen check swindle over the Labor Day week end in 1956, here in Anchorage? A. I did.

Q. And did Mr. Smith make some statements to you about it? A. He did.

Q. And now, during the course of this conversation, did anybody else come into the picture?

A. There was a Seattle Attorney by the name of John Harris, a former Assistant United States Attorney who was present during a portion of this interview with Mr. Smith.

Q. And was he there for the purpose of representing anybody? A. He was.

Q. Who? A. Mr. Smith.

Q. And subsequent to your interview, and subsequent to the time that Mr. Harris was there, did you cause the statements made by Mr. Smith to be reduced to writing? A. I did.

Q. Did you do that yourself?

A. I did that myself.

Q. And after they were reduced to writing, did you then show them to the defendant Smith? [244]

A. I did.

Q. Did he read them?

A. He did read them and they were read to him.

Q. And subsequent to that did you do anything with the statement that you had typed?

A. He signed it. He signed each page with his signature in my presence and I signed it.

Q. Now, this was after he had seen his attorney Richard Smith?

(Testimony of Edward J. Harkabus.)

A. That's correct—I believe not Smith—Harris, John Harris.

Q. I'm sorry. I became confused; and I think I got you confused.

Mr. Plummer: I at this time ask that this be marked for identification.

The Court: It may be marked as Government's Exhibit No. 20 for identification only.

Mr. Plummer: May I show it to the witness before showing it to counsel, just to have him identify it? This is the statement he typed up that day.

The Court: You may do so.

(Thereupon, the witness was handed the document.)

Q. (By Mr. Plummer): Will you look this over, Mr. Harkabus and tell me what it is, if you know—the item which you now have, which has been marked for identification only as Plaintiff's Exhibit No. 20?

A. This is a four-page statement which I typed for Mr. Smith's [245] signature. I recognize it from my own signature on there and from the contents of the statement.

Q. Thank you, Mr. Harkabus. Let the record reflect I am now showing the statement to counsel.

The Court: For my information, Mr. Plummer, how many more witnesses will you call in regard to this statement?

Mr. Plummer: If necessary, I will call possibly one, two, three, maybe four. It all is depending on

(Testimony of Edward J. Harkabus.)

the Court's ruling when the objection is made, if in fact an objection is made.

Mr. Kay: Would it be proper for us to inquire who they are?

The Court: Here is what I was getting at. It's been the practice of the Court to hear all witnesses you intend to call during this "out-of-the-hearing-jury" proceeding, and then thereafter, of course, they would be called again. I was trying to gauge my time is why I asked that question.

Mr. Plummer: I am probably optimistic, but I think that the objection which counsel are about to make will be overruled to the extent the hearing will be very, very limited, but in the event the objection is sustained, then I will probably call four witness, two of which will be very, very short.

The Court: Well, counsel, out of fairness to the court, I should like to hear more than one witness. That does not impugn Mr. Harkabus in any manner, whatsoever; it's just a question of [246] corroboration.

Mr. Plummer: Two of the witnesses I am going to call will be for the purpose of showing that the other witnesses that were there are not available and Mr. Trafton is in fact in Japan at the present time and Mr. Pass who was also present is in a Federal hospital down in the South some place.

The Court: Well, will you have then a witness to corroborate Mr. Harkabus' statements?

Mr. Plummer: The witnesses that I will have—the two witnesses that I will have will be to show that subsequent to arraignment—if I may pursue

(Testimony of Edward J. Harkabus.)

this while we're talking—subsequent to arraignment, both here and at Seattle, that Mr. Smith, the defendant, did as a matter of fact, say that the statement was true and further that he made that statement to the police officers and took them out and showed them different places he went to, mentioned in the statement, and, further, that he then went to——

Mr. Nesbett: If he is going to call witnesses to that effect, I'd say the best evidence is the testimony of those witnesses.

Mr. Plummer: That is the reason I am trying to be helpful to the Court in response to the Court's question. I am answering the Court.

Mr. Nesbett: I realize that, your Honor, yes.

The Court: Well, I am concerned. Are you going to call another witness who was there at the same time as Mr. Harkabus? [247]

Mr. Plummer: There are no other witnesses available.

The Court: What about this Mr. Harris, the attorney?

Mr. Plummer: I guess he is probably down in Seattle, but he is not under Government subpoena.

The Court: Well, thank you. There is nothing we can do but proceed, I suppose.

Mr. Nesbett: Well, your Honor, I know I will be reading this until noon (indicating Government's Exhibit No. 20). Maybe your Honor could be guided accordingly as far as the jury and the Court are concerned.

(Testimony of Edward J. Harkabus.)

The Court: It appears to the Court, Mr. Plummer, that we best take our lunchtime recess in light of that. I have a number of matters set down for 1:30. I wonder if we shouldn't ask the jurors to come back at 2:30 in the event we may have covered this problem satisfactorily to the Government?

Mr. Plummer: To the Government, yes.

Mr. Nesbett: I don't think that will be time enough. Did your Honor mean to commence this trial at 1:30?

The Court: No, 2:30.

Mr. Nesbett: I would say 3:00 o'clock at the earliest.

The Court: Will you please call the jurors down so the Court can properly instruct them?

(Thereupon, the Court Bailiff left the courtroom to bring the jurors back into the courtroom, after which the following proceedings were had in the [248] presence of the jury:)

The Court: Let the record show all the jurors are back and present in the courtroom. Ladies and gentleman, this matter is going to take considerable time to develop and determine; therefore the trial of this case will be continued until 2:00 p.m. this afternoon, but you are excused until 3:00 p.m. this afternoon. As you know, I must instruct you at this time not to discuss this case among yourselves, nor are you permitted to let others discuss it with you. You may now be excused and this Court will go into recess until 1:30.

No. 16,199

IN THE

United States Court of Appeals

For the Ninth Circuit

JAMES BURTON ING and
RAYMOND WRIGHT,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court, District of Alaska, Third Division.

BRIEF FOR APPELLANTS.

WENDELL P. KAY,
502 Second Avenue,
Anchorage, Alaska,
Attorney for Appellants.

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No. 16,199

IN THE

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Appeal from the District Court, District of Alaska, Third Division.

BRIEF FOR APPELLANTS.

JURISDICTIONAL STATEMENT.

On October 29, 1957, the grand jury filed in the District Court for the District of Alaska, Third Judicial Division, an indictment charging James Burton Ing, Raymond Wright, Charles E. Smith, John Walker, Dewey Taylor, and Lemuel Ashley Williams, with forgery by uttering and publishing forged checks in violation of Section 65-6-1, A.C.L.A. 1949 (R. 3-33). Count I of the indictment read as follows:

"Count I.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and

Charles E. Smith aka Wendell R. Ware did wilfully, unlawfully and feloniously with intent to injure and defraud C. A. Peters, owner of the Fifth Avenue Cash Grocery, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc.
General Contractors
Boise, Idaho

Pay Check No. 9078

This check not good for more than sixty days.

Contract 1787—August 22, 1956.

Period Ended 8/19/56.

Pay to the Order of Wendell R. Ware.

Badge No. 1177.

Gross Earnings 236.00

Deductions

WT & FICA 26.20 A.U.C. 1.18 Alaska I.T. 3.15
B. and L. 28.00

Amount of Check $177.47.

The sum of $177 and 47 cts.

The First National Bank
of Anchorage

59-6 Anchorage, Alaska.

Morrison-Knudsen
Company, Inc.
By /s/ Guy M. King.

(Reverse side of check with endorsement and bank stamps are not reproduced because they are partially illegible.)

The said James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware well knowing at the time that the check was false and forged."

The remaining counts of the indictment were similar, charging appellants Ing and Wright in each count, together with one of the other defendants.

The defendants Walker, Taylor, and Williams had entered pleas of guilty prior to trial, and Walker and Taylor testified for the Government. They had not yet been sentenced.

The trial of Ing, Wright, and Smith was completed by the filing of the jury verdicts on February 28, 1959. Appellant Wright was convicted on Counts VI through XVIII of the indictment, inclusive, and acquitted of the remainder of the charges (R. 35-37). Appellant Ing was convicted of all twenty counts (R. 34-35). Smith was found guilty on four counts, and filed a separate appeal which has already been decided by this Court.

On March 5, 1958, Ing was sentenced to 15 years on each of the twenty counts of which he had been convicted, the sentences to run concurrently, and Wright was sentenced to serve 12 years on each of the thirteen counts of which he had been convicted, his sentences also to run concurrently (R. 37-40).

The District Court had jurisdiction of the indictment and of the trial by virtue of the provisions of Sections 53-1-1, 53-2-1, and 65-6-1 of the Alaska Compiled Laws Annotated, 1949.

The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal by virtue of the provisions of Sections 1291 and 1294, Chapter 83, Title 25, U.S.C., and Section 14 of Public Law 85-508, 72 Stat. 339.

STATEMENT OF THE CASE.

Claude Kenneth Brownfield, a resident of Chicago, Illinois, was the chief witness against the appellant Ing. Brownfield testified that he first became acquainted with Ing in the Spring of 1956 in Chicago (R. 476). Ing stated that he was "trying to get something lined up in the form of checks in Alaska and would I be interested in taking part in it," Brownfield testified (R. 478). Later, Brownfield received several letters from Ing discussing a plan to forge and pass checks in Alaska. Brownfield testified that he destroyed these letters (R. 479-480).

Late in August, 1956, Brownfield received a box containing a check protector, two birth certificates, and approximately 400 checks that appeared to be payroll checks drawn on the Morrison-Knudsen Company (R. 480-481). He stated that the checks were already signed by one Guy King, but that the rest of the checks were blank. Brownfield, together with two confederates, Eckley and Hausam, then brought the checks to Fairbanks, and, according to Brownfield, delivered the contents of the box in a suitcase to Ing at the Fairbanks Country Club (R. 481-482). Ing explained to Brownfield that arrangements had been made to pass checks in both Fairbanks and Anchorage

over the long Labor Day week-end, after which the passers would "catch planes out of Alaska" (R. 483). Ing and Brownfield typed in names and amounts on the checks and jointly ran them through the check protector (R. 484). Ing furnished Brownfield with identification (R. 486), paid for his transportation to Alaska (R. 489), and Brownfield commenced to pass checks on schedule (R. 505). He was promptly arrested, and was convicted at Fairbanks in December of 1956 (R. 505, 511), and was brought to this trial from the Federal Penitentiary at McNeill Island, Washington in order to testify (R. 542). At the time of this trial, Brownfield was under indictment at Fairbanks on four counts of forgery and one count as an habitual criminal (R. 470, 538, 543, 546, 548). Brownfield did not mention the appellant Wright in his testimony.

Upon his return to the penitentiary, Brownfield recanted his testimony against Ing, both in letters (R. 44-45) and affidavits. After hearing repeated arguments for a new trial based on Brownfield's recantations, the trial court entered a minute order indicating "that it would not grant motion for new trial based on the recantations of the witness Claude Brownfield, and that the matter should be disposed of by the Ninth Circuit Court of Appeals" (R. 54).

The defendant John Walker, a resident of Seattle, had already entered pleas of guilty to six counts of the indictment prior to his testimony (R. 414). Walker testified that he knew both Ing and Wright, and that Wright discussed with him in August, 1956

"trying to make some big money" (R. 415). Walker testified that he never had any discussions with Ing (R. 415), but he testified that Ing took his, Walker's, picture with a Polaroid camera about the 30th of August, and pasted it on an identification card, which Walker later used in passing checks (R. 417). Walker testified that he and Taylor accompanied Wright to Anchorage on the Friday before the Labor Day weekend (R. 418). He testified in detail concerning his part in passing a number of checks in Anchorage (R. 419-424), and then testified that he, Taylor and Wright drove back to Fairbanks (R. 425-427). He testified that a number of items which they had purchased with the proceeds of the forged checks were unloaded at Wright's residence (R. 427-428). Walker had been convicted of several misdemeanors (R. 429-430), and was awaiting sentence on six counts of forgery at the time of his testimony (R. 432).

Dewey Taylor, a defendant who had already entered pleas of guilty to several counts of the indictment (R. 128-129), testified in some detail as to his acquaintanceship with Wright, the agreement to pass checks, and the trip from Fairbanks to Anchorage and back in the company of Walker and Wright (R. 65-80). He identified a number of the checks and admitted cashing them at various places in Anchorage (R. 97-104). Taylor did not mention the appellant Ing, except to state that he knew him (R. 65).

Aside from the testimony of these alleged accomplices, the only testimony concerning either of the appellants was as follows:

George W. Hooker, Assistant Manager of the Westward Inn at Anchorage, testified that James B. Ing and his wife were guests at the hotel on August 31 through September 2, 1956, and that he made two local phone calls on August 31 and one long distance call, upon which the toll charge was $2.50 (R. 455-457).

Eli Williams, a resident of Anchorage, testified that Raymond Wright stayed at his home over the Labor Day week-end of 1956 (R. 371). Williams testified that Wright often visited him and that he observed "nothing unusual" about this particular visit (R. 374).

Ernest Yokely, brought to Court from the Anchorage jail, and awaiting prosecution on a charge of attempting to escape (R. 559-560), testified that he had once been at the home of Eli Williams when Raymond Wright, John Walker and Dewey Taylor were also present (R. 556). He could not establish the date of this occurrence but estimated that it was "about a year ago" (R. 556). This would have been approximately February, 1957 (R. 557).

At the close of the Government's evidence, both appellants moved for judgments of acquittal, and the Court reserved decision (R. 564-565). Following argument, both appellants rested without presenting evidence, and again moved for judgments of acquittal (Smith Record 268).

Following the verdicts of the jury, judgments, and sentences, these appeals followed.

STATEMENT OF POINTS.

For appellant Ing:

1. The Court erred in denying defendant's motions to dismiss the indictment.

2. The Court erred in denying defendant's motion for judgment of acquittal, made at the close of the evidence offered by the Government.

3. The Court erred in denying defendant's renewed motion for judgment of acquittal, made at the close of all the evidence.

4. The Court erred in refusing to give the instruction requested by the defendant, that the witness John Walker and the witness Claude Brownfield were accomplices.

5. The Court erred in refusing to give the instruction requested by the defendant that the witness John Walker was an accomplice.

6. The Court erred in refusing to instruct the jury as requested that the witness Claude Brownfield was an accomplice.

7. The Court erred in instructing the jury as follows:

"This indictment is a mere allegation of the charges against the defendants and is not, in itself, any evidence of guilt, and no juror should permit himself to be influenced against the defendants because of the fact that an indictment has been returned against the defendants.

"To this indictment the defendants, James Burton Ing, Raymond Wright, and Charles E. Smith, have

pleaded not guilty, which pleas are a denial of the charges and put in issue every material allegation of the indictment.

"It therefore, becomes the duty, and it is incumbent upon the Government to prove every material element of the charges contained in the indictment to your satisfaction beyond a reasonable doubt.

"The exact date of the commission of the crime charged in the indictment is not material provided the crime was committed within five years prior to the date of the indictment. It is sufficient if you find the crime so charged was committed on any date within five years prior to the date of the indictment.

"The law presumes every person charged with crime to be innocent. This presumption of innocence remains with the defendants throughout the trial and should be given effect by you unless and until, by the evidence introduced before you, you are convinced the defendants are guilty beyond a reasonable doubt," to which objection was made and exception allowed.

8. The Court erred in instructing the jury as follows:

"In this case, the Government relies in part upon the testimony of admitted accomplices.

"You are instructed that an accomplice is one, who, being of mature age and in possession of his natural faculties, cooperates with or aids or assists another in the commission of a crime.

"With respect to such testimony, the laws of Alaska provide as follows:

"'A conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely shows the commission of the crime or the circumstances of the commission.'

"The provision of Alaska law which is quoted means that the corroborating evidence required to be given before conviction can be had must, in itself, and independent of all accomplice testimony, tend to connect the defendants with the commission of the crimes charged against them, and must tend to show not only that the crimes have been committed, but that the defendants were implicated in them. Corroborating testimony need not be direct; it may be circumstantial; and, whether direct or circumstantial, if it corroborated the testimony of an accomplice in a material particular and tends to connect the defendants with the crimes charged, it is sufficient to meet the requirements of the statute and support a conviction.

"This law does not mean that the corroborative evidence alone must be sufficient to justify conviction, but it does require that unless in your judgment the corroborative evidence alone and by itself tends to connect the defendants with the crimes charged, the defendants should be acquitted, no matter how convincing the accomplice testimony may be.

"If you find that the corroborative evidence alone, if any, does tend to connect the defendants, or any of them, with the commission of the crimes charged

against them, then you should consider all of the evidence against such defendant or defendants, including all accomplice testimony, and if all of the evidence, including both that of the accomplices and that of the corroborative testimony, convinces you beyond a reasonable doubt of the guilt of the defendants, or any of them, you should render a verdict accordingly; otherwise the defendants, or any of them, should be acquitted.

"Section 58-5-1, Compiled Laws of Alaska, 1949, provides in part as follows:

" 'That the testimony of an accomplice ought to be viewed with distrust.'

"You are accordingly instructed that the testimony of the government witnesses, self-confessed accomplices in the commission of the crimes charged in the indictment in the case now on trial before you, ought to be viewed with distrust,"

to which objection was made and exception allowed.

9. The Court erred in instructing the jury as follows:

"You are instructed that all persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the crime or aid and abet in its commission, though not present, are principals, and to be tried and punished as such. However, one who is merely present but does nothing to aid, assist or abet or induce the other to commit the crime is not guilty. It must be shown that he actually participated

in its commission from which it follows that if the evidence warrants you may find one of the defendants guilty and the other not guilty. Therefore, if you find from the evidence beyond a reasonable doubt that the defendants, acting either in concert or in pursuance of a previous understanding or common design, committed the crime charged in the indictment, each would be guilty as principal regardless of which of them uttered and published the checks in question, for it is immaterial to what degree any one of them participated in the commission of the crime so long as you find beyond a reasonable doubt that any one knowingly aided, abetted or assisted the others, or any of the others, in its commission,"

to which objection was made and exception allowed.

10. The verdict is contrary to the weight of the evidence.

11. The verdict is not supported by substantial evidence.

12. The Court erred in failing to grant the defendant's motion for a new trial.

13. Other manifest error appearing of record, to which objection was taken and exception reserved.

For appellant Wright:

1. Insufficiency of the evidence to establish the charge or to support the verdict and/or judgment on the charge contained in the indictment.

2. That the District Court and the Judge thereof erred in denying appellant's motion made at the con-

clusion of all the evidence in the case for a judgment of acquittal.

3. That the verdict is contrary to the weight of the evidence.

4. That the verdict is not supported by substantial evidence.

5. That in the absence of any corroborating testimony other than that furnished by the accomplices, no question of fact remained to be submitted to the jury.

6. That Section 66-13-59 of the Alaska Compiled Laws, Annotated, is controlling, and that in the absence of independent corroboration was sufficiently compelling to grant the motion for judgment of acquittal.

SUPPLEMENTAL STATEMENT OF ADDITIONAL POINT.

For both appellants:

1. The United States Attorney committed reversible error in commenting on the failure of the appellants to take the witness stand, and the trial Court erred in failing to properly instruct the jury after the United States Attorney's comments.

SUMMARY OF ARGUMENT.

The record of this trial is somewhat lengthy (some 570 pages), but the great bulk of the evidence related

to the circumstances of the passing of the various checks named in the indictment, and the identification of those checks and the fact that they were forged. The only evidence tending to implicate either of these appellants with the commission of these crimes, came from the lips of accomplices. This accomplice testimony was completely uncorroborated. Therefore, we contend that the Court should have granted judgments of acquittal to each of the appellants.

There were a number of other errors committed by the Court in the instructions given and refused, and the verdicts are contrary to the weight of the evidence. However, these errors are all included, in effect, within the boundaries of the basic error committed by refusing to grant judgments of acquittal.

The United States Attorney clearly erred in commenting on the failure of the appellants to take the witness stand. The court made no attempt to avoid this error by proper instructions to the jury.

ARGUMENT.

POINT 1. THE TESTIMONY OF THE ACCOMPLICES WAS COMPLETELY UNCORROBORATED; THEREFORE THE COURT ERRED IN REFUSING TO GRANT MOTIONS FOR JUDGMENTS OF ACQUITTAL.

All of the testimony against the appellants came from the lips of accomplices. The testimony of these witnesses has been reviewed in some detail earlier in this brief. The appellants contend that there was no evidence whatsoever corroborating these accomplice

witnesses, and no evidence tending to connect either of the appellants with the commission of these crimes, other than the accomplice testimony. The Government, on the other hand, maintains that the testimony of the accomplices is corroborated by the following facts: (1) That Ing stayed at the Westward Inn at Anchorage, over the Labor Day week-end of 1956; (2) That Wright visited a friend, Eli Williams, at Anchorage, over the same Labor Day week-end; (3) That two documents, a driver's license and an identification card, produced during the testimony of the accomplice witness Brownfield, were given to him by Ing, according to Brownfield. We will consider these points in order.

A. Presence in Anchorage.

The statutes here involved read as follows:

> "Section 58-5-1, ACLA 1949. The jury . . . are, however, to be instructed by the court on all proper occasions:
>
> * * *
>
> Fourth. That the testimony of an accomplice ought to be viewed with distrust and the oral admissions of a party with caution. . . ."

> "Section 66-13-59, ACLA 1949. Corroboration of testimony of accomplice. That a conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely shows the commission of the crime or the circumstances of the commission."

These statutes came, as do many Alaska laws, from Oregon. In *State v. Odell* (1880), 8 Ore. 30, the Supreme Court of Oregon said:

> "The fact of the presence of the defendant Odell in the same town at the time of the commission of the offense, or immediately before or afterwards, is not sufficient evidence to connect the defendant Odell with the commission of the crime charged in the indictment."

Nearly sixty years later, in *State v. Reynolds* (Ore. 1939), 86 P. 2d 413, the Court reiterated and repeated the same principle. In the *Reynolds* case, the Court pointed out the policy of the law:

> "The reason why it is the policy of our law that a defendant may not be convicted upon the testimony of an accomplice unless there is other evidence which, taken by itself and without regard to the testimony of the accomplice, tends to connect the defendant with the commission of the crime is because, as has often been said, accomplice testimony comes from a corrupt and polluted source, and any other rule would expose to the peril of unjust conviction innocent men whom the accomplice might find it to his interest to implicate in his crime." (P. 422).

Certainly the accomplice testimony here came from such corrupt and polluted sources. The witness Brownfield has already been convicted of larceny, manslaughter and forgery, and was then awaiting trial on four additional counts of forgery and a count charging him as an habitual criminal (R. 511). The witness Walker had entered a plea of guilty to six

counts of forgery, and was awaiting sentence at the time of his testimony (R. 414); he had previously been convicted of numerous misdemeanors (R. 430), and testified that he had made up his mind to plead guilty when he found out that ". . . there was no other way I could possibly get out of this unless I did" (R. 435). The witness Dewey Taylor, an itinerant musician (R. 116), had plead guilty to seven counts of forgery and was awaiting sentence at the time of his testimony (R. 65).

The Government suggests that the fact that the defendant Ing and his wife stayed at the Westward Inn at Anchorage over a portion of the Labor Day week-end, and that the appellant Wright visited a friend in Anchorage over the same week-end, tends to connect these appellants with the commission of the crimes charged.

It takes a long stretch of the imagination to allege that the mere presence of a defendant in a city where the crime is committed is an incriminating circumstance. Repeatedly the Courts have rejected any such suggestion.

In *State v. Jones* (Mont., 1933), 26 P. 2d 341, the defendant was charged with robbery. An accomplice testified in detail against him in a manner reminiscent of the witness Brownfield here; as corroboration the State offered evidence that the defendant was actually present at the scene of the conspiracy, and later in the vicinity of the offense, in addition to other allegedly corroborating circumstances. The Court held:

> "The presence of the defendant at or near the place where a conspiracy is said to have been formed, at or about the time of its forming, if formed at all, with any motive the defendant may be shown to have had for the commission of the crime may be considered in this connection. . . .
>
> But the mere showing of opportunity to have joined in the commission of the offense, or evidence which raises a suspicion that the defendant was implicated, is not enough . . . , and where the facts and circumstances relied upon for corroboration are as consistent with innocence as with guilt, a conviction on the testimony of an alleged accomplice must be set aside. . . ."

After further reviewing the evidence, the Court went on to point out that:

> "The independent testimony does no more than show opportunity for the defendant to have conspired to commit the crime and to raise a suspicion that he did so, and, without further corroboration which in fact tends to connect him with the commission of the offense, the judgment, based on the testimony of Smith, the accomplice if Jones is guilty, cannot stand." (P. 345).

We urge the Court to review the facts of this case, as we believe it presents a much stronger case of corroboration than is under consideration in the present instance; nevertheless, the Supreme Court of Montana found the evidence wholly insufficient.

In *Hatton v. Commonwealth* (Ky., 1934), 68 S.W. 2d 780, the defendant had been convicted of housebreaking upon the direct testimony of an alleged

accomplice, and testimony of two other witnesses that he was seen in the vicinity of the house in question on the day of the larceny. The Court pointed out that such evidence as the presence of the defendant in the area would show no more than an opportunity to commit the crime, and held that the evidence was insufficient to connect the defendant with the offense. In *Cornett v. State* (Okla., 1929), 274 P. 676, the defendant was charged with bank robbery. Two alleged accomplices testified in detail concerning the commission of the crime and the participation of the defendant in planning the operation. For corroboration, the State depended upon the testimony of two witnesses that the defendant was seen near the scene of the crime on the day of the robbery. Said the Court (in a syllabus by the Court):

> "Where witnesses for the State admit they participated in the robbery of a bank and attempt to implicate the defendant in the robbery, their testimony is not sufficiently corroborated by merely showing that the defendant was near the scene of the robbery. Corroboration of the accomplices must show more than a commission of the offense. Some fact or circumstance implicating the accused in the perpetration of the crime must be shown independently of the testimony of the accomplices."

So, too, in *Pate v. State* (Tex., 1922), 239 S.W. 967, the defendant was accused of robbery, and an accomplice testified against him in detail. Evidence was offered to corroborate the accomplice to the effect that the defendant had been seen in the town where the

crime was committed on the afternoon of the robbery. Reversing the judgment of conviction, the Court said:

> "We are unable to give our assent to the incarceration of a citizen of this State in the penitentiary upon corroborative evidence of no greater strength than appears in the present case." (P. 968).

It should be obvious that, excluding the accomplice evidence in the present case, the mere presence of the defendant Ing and his wife at the Westward Inn during the period of time when the crimes were committed, and the visit of Wright to a friend in Anchorage, would no more tend to incriminate either Ing or Wright than it would any other resident of Anchorage, or any other visitor to Anchorage over the Labor Day week-end.

Repeatedly, the State Supreme Courts, across the Nation, have held that the mere presence of the defendant in the town where the crime was committed, or even his appearance in the vicinity where the crime was committed, is not corroborating evidence tending to connect the defendant with the commission of the crime; such evidence may raise a "grave suspicion" of the accused's guilt, or may show that he had an "opportunity" to commit the crime. But it takes more than suspicion and opportunity to meet the requirements of the law regarding corroboration. See for example, *State v. Lay* (Utah, 1910), 110 P. 986 (occupancy of an adjacent hotel room as corroboration of adultery; conviction reversed); *People v. Colmey* (N.Y. 1906), 101 N.Y.S. 1016 (Defendant seen in

offices where accomplice testified he had attempted to pass a forged stock certificate; conviction reversed); *State v. Lane* (Utah, 1954), 277 P. 2d 820 (Forgery conviction on accomplice testimony, and corroboration of presence in the area and other circumstances; conviction reversed).

B. The Driver's License and the Identification Card.

During the testimony of the witness Brownfield, a driver's license and an identification card were produced and offered in evidence, which Brownfield testified were given to him by Ing (R. 486-488). Do these documents, standing alone, tend to connect the defendant with the commission of the crime? Clearly not. The driver's license and the identification card are not independent facts; they are an integral part of the testimony of the accomplice Brownfield. And any tendency which they might have to implicate the defendant Ing, comes only from the testimony of Brownfield. Standing alone they are meaningless. So-called corroborative evidence is insufficient if it "takes direction and tends to connect the appellants with the offense charged only when interpreted by and when read in conjunction with the testimony of the admitted accomplice." *People v. Hoyt* (Cal., 1942), 125 P. 2d 29-32.

In the case of *State v. Duncan* (Ia., 1912), 138 N.W. 913, the accomplice witness testified as to the defendant's participation in a burglary, and further testified that a particular revolver which had been taken during the commission of the crime had been

placed by the defendant in a certain vault. The prosecution insisted that finding the revolver in the place where the accomplice testified the defendant placed it, tended to corroborate the testimony of the accomplice and connect the defendant with the commission of the crime. The Court said:

> "This corroboration must be by testimony other than that which comes from the accomplice, and it must tend to connect the defendant with the commission of the offense. It is manifest that the finding of the revolver at the place where the accomplice, Fowler, said defendant put it, does not tend to corroborate the witness, for he may have put the revolver there himself and concocted the story about the defendant telling him that the defendant placed it there." (P. 914).

So here, Brownfield could have obtained these items anywhere from anyone; nothing intrinsic to either would connect them with Ing.

In *State v. Brown* (Ia., 1909), 121 N.W. 513, the accomplice witness testified that certain unsigned letters received by her had been written by the defendant, and the letters were therefore offered as corroborating her testimony. The Court held that the letters alone supplied no corroboration of the testimony of the accomplice; only if they were connected with the defendant by other independent evidence could they be considered as any evidence of corroboration. In the *Brown* case there was such other evidence, consisting of a handwriting comparison. In the present case there was no other evidence concern-

ing either the driver's license or the identification card which in any way tended to identify either or connect either with the defendant Ing. There was nothing but the testimony of the accomplice. See also, *People v. Compton* (Cal., 1899), 56 P. 44.

A multitude of similar cases could be cited, but the general rule is clear: An item of evidence does not "tend to connect the defendant with the commission of the crime," where it comes from and depends entirely on the story of the accomplice, and does not in and of itself tend to connect the defendant with the commission of the crime.

The *weight* of corroborating evidence is a question for the jury. However, the *presence* of corroborating evidence and its sufficiency to go to the jury, or to constitute corroboration, is definitely a question of law for the Court, and it would be reversible error for the Court to submit a case to the jury where there actually was no corroborating evidence to support the testimony of the accomplice witnesses. *United States v. Murphy* (D.C., N.Y., 1918), 253 F. 404.

In *People v. White* (Cal., 1939), 94 P. 2d 617, 621, the Court said:

> "The corroboration necessary to support the testimony of an accomplice must be of some fact tending to prove the guilt of the accused. It is not sufficient if it is equivocal or uncertain in character and must be such that legitimately tends to connect the defendant with the crime. It must be of a substantive character, must be inconsistent with the innocence of the accused, and must do more than raise a suspicion of guilt."

If we apply these principles to the present case, it is difficult to see how the conviction of the appellants can properly be sustained. Here we have none of the evidence which is ordinarily produced in such cases to corroborate the testimony of the accomplice. The appellants were not found in possession of the typewriter which was allegedly used to forge the checks, nor the check protector which was allegedly used to fill them out, nor any other item of evidence of any kind. No handwriting expert was produced to testify as to the handwriting of either of the appellants. No witness, other than an accomplice, testified that either Ing or Wright ever saw the checks in question or handled them in any way. Other than the testimony of the accomplices, no witness was produced who ever saw either of the appellants with any of the accomplices or other participants in the crime, either in Chicago, Fairbanks, or Anchorage. No witness was produced to connect any of the items of physical evidence, or exhibits in the case, with the appellants, other than the accomplices. No witness testified that either Ing or Wright ever received any of the proceeds of the swindle, or had any part in the distribution of the money obtained. No witness was produced to testify that either Ing or Wright were in need of money, or had any other motive to participate in such a proceeding. In short, although *thirty witnesses* testified on behalf of the Government, not one word of testimony, and not one item of evidence, was produced tending to connect either of the appellants with the commission of these crimes, other than the testimony of the admitted accomplices.

C. The Witness Brownfield Was an Accomplice.

At previous stages of this case, the Government has contended that the witness Claude Brownfield was not an accomplice, although he admitted his participation in detail. We submit that the record is clear on this point, and that only one conclusion could be reached: That Brownfield was an accomplice.

Brownfield testified that he transported the checks which were later used in Anchorage, in a package containing other items, from Chicago, Illinois, to Fairbanks, Alaska, shortly before the checks were passed (R. 481). He further testified that, after arriving in Fairbanks, he actively participated in filling out the checks on a typewriter, and that he and defendant Ing then ran the checks through a check protector (R. 484). He admitted being told that a portion of the checks were to be cashed in Anchorage. The Government contends that Brownfield had little knowledge of the scheme to forge and pass checks in Alaska, that he did not actually participate in the forgery of the checks passed in Anchorage, and that his activities in Fairbanks amounted to no more than "guilty knowledge" of the crimes allegedly committed in Anchorage. However, this version of the facts does not correspond with the testimony of Brownfield as set forth in the record. Actually, according to the undisputed testimony, Brownfield transported *all* of the checks to Alaska from Chicago, together with the check protector (R. 481, 485). He did this knowing full well of the essential details of the scheme to pass the checks over the Labor Day week-end (R. 478-80,

482). According to his testimony, he and Ing filled out *all* the checks on the typewriter, including those passed in Fairbanks and those passed in Anchorage (R. 484). He drew no distinction between those checks used in Fairbanks and those to be used in Anchorage. Again, according to his testimony, he and Ing ran *all* of the checks through the check protector, an essential part of preparing the checks for passing (R. 484). Again, to reiterate, Brownfield carried on these activities knowing full well of the scheme to pass a portion of the checks in Anchorage (R. 482-3).

The essential fact element is that Brownfield knew and consented to the entire scheme. He was a willing participant. There was no dispute whatever in the testimony, and it is crystal clear from the facts that Brownfield was an accomplice of the appellants in the scheme to pass checks in the City of Anchorage, if they were involved in the scheme.

Section 66-9-23, A.C.L.A. 1949, reads as follows:

> "That the distinction between an accessory before the fact and a principal, and between principals in the first and second degree in cases of felony, is abrogated, and all persons concerned in the commission of a felony, whether they directly commit the act constituting the crime or aid and abet in its commission, though not present, must be indicted, tried and punished as principals, as in the case of a misdemeanor."

Section 65-3-2, A.C.L.A. 1949, reads as follows:

> "That all persons concerned in the commission of a crime, whether it be felony or misdemeanor,

> and whether they directly commit the act constituting the crime or aid and abet in its commission, though not present, are principals, and to be tried and punished as such."

Reduced to its simplest terms, the question involved at this point becomes: Is a person who actively participates in the commission of a forgery, knowing the general scheme under which the instruments are to be forged and passed, an accomplice of those who later pass and utter the forged documents? Under these Alaska statutes, it is difficult to see how the Government could maintain that Brownfield is not an accomplice, as these sections clearly define as a principal anyone who aids and abets in the commission of the crime, although not present. Certainly, there would seem to be no question but that Brownfield could have been indicted as a principal under the language of these statutes, for his act in knowingly transporting the checks to the Territory of Alaska, if he had done nothing else. He clearly identified the very checks in evidence at the trial, as checks which he had transported to the territory of Alaska (R. 490-491).

As to the meaning of the term "aiding and abetting" in this connection, the Supreme Court of the United States said in *Nye and Nissen v. U.S.* (1949), 336 U.S. 613:

> "Aiding and abetting has a broader application. It makes a defendant a principal when he consciously shares in any criminal act whether or not there is a conspiracy. . . . Aiding and abetting rests on a broader basis; it states a rule of

criminal responsibility for acts which one assists another in performing." (P. 620).

The statute under which the appellants were charged with forgery, Section 65-6-1, A.C.L.A. 1949, reads as follows:

> "That if any person shall, with intent to injure or defraud anyone, falsely make, alter, forge, counterfeit, print, or photograph any . . . , or check or money, . . . ; or shall, with such intent, knowingly utter or publish as true and genuine any such false, altered, forged, counterfeited, falsely printed, or photographed record, writing, instrument, or matter whatsoever, such person, upon conviction thereof, shall be punished, . . .".

Thus, in Alaska, the offenses of forging an instrument, and passing or uttering the instrument, are covered by the same statute. In *Lett v. United States* (C.C.A. 8th, 1926), 15 F. 2d 686, the question was whether or not the purchaser of narcotics is an accomplice of the seller, the purchaser herself being guilty of possession. The Court held that the purchaser was an accomplice, quoting the language of *Egan v. United States* (C.A., D.C., 1923), 287 F. 958, and pointing out that:

> "Not only was the witness Josephine West herself guilty of an offense, amounting to felony, against this same statute, but by her act of purchase she aided, assisted, and encouraged plaintiff in error in the commission of a crime; she was therefore an accomplice within the definition of that term." (P. 689).

In *Preston v. State* (Tex., 1898), 48 S.W. 581, the defendant was charged with uttering a forged deed by tendering the deed to the County Clerk for recordation. Among the witnesses against the defendant was the Notary Public who had attested the signature on the deed several months before, and there was conflicting evidence as to whether or not the Notary Public was an accessory to the forgery. The Court pointed out the distinction between the crime of forgery and the crime of uttering and passing. After considering the evidence, the Court held that the parties to the forgery were accomplices of the party uttering the deed, and said:

> "While it is true that Burke and Nicholson did not participate in uttering said alleged forged deed, and were not particeps criminis in that offense, yet we think the charge as given by the court was merely intended to characterize them as accomplices under the statute covering the testimony of accomplices. We believe, however, that it would have been better for the court to have instructed the jury, if they believed that said parties participated in forging the deed, which was alleged to have been subsequently uttered by appellant, that they were, in contemplation of our statutes with reference to accomplices' testimony, accomplices, and that their testimony required corroboration, and, in the absence of corroborating testimony, no conviction could be had of appellant on the charge of uttering said forged instrument."

To the same effect is *People v. Menne* (Cal., 1935), 41 P. 2d 383, and *People v. Warden* (N.Y., 1953), 124 N.Y.S. 2d 131.

A very clear discussion of the question of whether the forger is the accomplice of the passer occurs in *State v. Phillips* (Mont., 1953), 264 P. 2d 1009, where the defendant was charged with passing and uttering a state warrant for a gasoline tax refund containing a false and forged endorsement, made by another person. Said the Court:

> "The relation between the forger and one passing the instrument knowing it to contain a forged endorsement is analogous to that between a thief and one receiving the property knowing it to have been stolen. It has been held that one who steals property is not an accomplice of one who receives the property knowing it to have been stolen *unless the thief and the receiver act in concert in advance of the larceny,* because they are separate and distinct crimes. . . . That same principle governs this case." (1014-15, Emphasis supplied).

Applying these principles to the facts of the instant case, it is clear that Brownfield was and is an accomplice. According to his own testimony he was fully aware of the entire scheme to forge and pass these checks, including the fact that some of them would be uttered in Anchorage. He did his work knowing and consenting to the activities which were to occur. As to the analogy which the Montana Court drew in the *Phillips* case between the crime of forgery and the crime of uttering, as compared to the crime of larceny and the crime of receipt of stolen property, this Court has already spoken on that subject. In the case of *Stephenson v. United States* (C.A. 9th, 1954), 211 F. 2d 702, 14 Alaska 603, the Court pointed out:

"The usual test to be applied in determining whether the thief is an accomplice is whether the thief could be convicted of the identical crime for which the defendant is being prosecuted. The reason underlying the general rule is that larceny and receiving stolen property are separate crimes, and since the thief cannot be convicted of receiving stolen property from himself, he is not an accomplice."

However, the Court went on to say:

"To the general rule, however, there is increasing recognition of an exception to the effect that where the thief and the receiver of stolen property entered into an agreement prior to the larceny for one to steal and the other to receive, the thief is an accomplice of the receiver and vice versa. . . . The exception is based on the distinction between one who is an accessory both before and after the fact. The theory is that the previous arrangement between the thief and receiver amounts in effect to a conspiracy for both the theft and receipt of the stolen property, under such circumstances the usual test for determining an accomplice is met, since the thief and receiver can be prosecuted for both the theft and receipt of stolen property."

So, in the present case, where the understanding admitted by Brownfield covered both the forging and the contemplated passing of the checks in question, it would seem clear that Brownfield was an active participant in the forgery and clearly an accessory before the fact of the passing. An accessory before the fact, being guilty as a principal under the pro-

visions of the Alaska laws quoted above, Brownfield was clearly an accomplice and the court should so have instructed. In fact, the evidence being clear and uncontradicted, it was reversible error to refuse to instruct that the witness Brownfield was an accomplice, as a matter of law. *People v. Swoape* (Cal., 1925), 242 P. 1067; *People v. Black* (Cal., 1941), 113 P. 2d 746, 755; *People v. Elbroch* (N.Y., 1937), 294 N.Y.S. 961; *State v. Carr* (Ore., 1895), 42 P. 215; *Ripley v. State* (Tenn., 1950), 227 S.W. 2d 26.

And, there being a total absence of corroboration, it was the duty of the Court to grant motions for judgment of acquittal.

POINT 2. THE UNITED STATES ATTORNEY ERRED IN COMMENTING ON THE FAILURE OF THE APPELLANTS TO TAKE THE WITNESS STAND, AND THE COURT ERRED IN FAILING TO PROPERLY INSTRUCT THE JURY CONCERNING THE COMMENT.

1. At Page 271 of the Smith transcript, the following occurred during final argument by the United States Attorney:

> "Now, there's also much innuendo about the reliability of the Government's evidence. I say, and you know, it's the only evidence you have. If they didn't feel that it was reliable, why didn't they put on some evidence? Why didn't they put some evidence on? You have no choice; you have no evidence or no testimony other than that adduced by the Government witnesses, and by the Government . . .

Mr. Kay. I hesitate to interrupt Mr. Plummer's argument, but I want to register an objection to that line of argument as tending to violate the constitutional right the defendant may have.

The Court. Well—

Mr. Plummer. I didn't mention anybody, except why didn't they put on a defense?

The Court. That is correct. Objection overruled. If it had referred to an individual, then I would concur, Mr. Kay.

Mr. Kay. They refer to the three individuals at this counsel table and no one else.

The Court. Of course, that is true.

Mr. Plummer. I didn't say . . . may counsel approach the bench a moment?

The Court. I don't think it is necessary, counsel. Let's proceed.

Mr. Plummer. Fine. Now, also, I think . . ."

The authorities on this point indicate that while most Courts recognize the rule that the prosecuting attorney shall not comment on the failure of a defendant to take the witness stand on his own behalf, and refer to such comments as "gross error", nevertheless in the cases reported and examined, the decisions have often found some reason to condone such alleged objectionable remarks; generally, condonation is based on the ground that defense counsel provoked the objectionable comments, or because of the particular peculiar facts of the case under consideration. Certainly there was no provocation in the instant proceeding, and we submit that there were no peculiar facts rendering these comments unobjectionable.

In *Wilson v. U.S.* (1893), 149 U.S. 60, the Prosecuting Attorney in his enthusiasm said:

> "If I am ever charged with a crime, I will not stop by putting witnesses on the stand to testify as to my character, but I will go on the stand, and hold up my hand before high heaven, and testify to my innocence of that crime." (66).

The above comments were held to be a violation of the defendant's constitutional rights. On the other hand, in *Jackson v. U.S.* (C.C.A. 9th, 1900), 102 F. 473, 487, the comment, "Why didn't the defendant put a sworn witness on the stand . . .", was held not to be construed as a comment on defendant's failure to testify.

In this case, the United States Attorney said, "Why didn't they put on some evidence? Why didn't they put some evidence on?" If these comments stood alone, very probably they would not necessarily be construed as a violation of the constitutional rights of the defendant. However, these remarks were interrupted by an objection, since we felt that we could possibly expect additional and more pointed comments on the subject if the United States Attorney continued. Our only alternative was to call the attention of the Court to this line of argument in the hope that it would be stopped before reversible error was committed. My objection was:

> "Mr. Kay. I hesitate to interrupt Mr. Plummer's argument, but I want to register an objection to that line of argument as tending to violate the constitutional right the defendant may have."

The court commenced to respond, but the United States Attorney interrupted the possible ruling to say:

> "Mr. Plummer. I didn't mention *anybody,* except why didn't *they* put on a defense?" (Emphasis supplied).

Thus, the United States Attorney pointed out to the Court, and the jury, that no particular person had been mentioned by name. But, instead of simply overruling the objection, the Court stated:

> "The Court. That is correct. Objection overruled. If it had referred to an *individual,* then I would concur, Mr. Kay." (Emphasis supplied).

Now, the court has joined with the United States Attorney in pointing out to counsel, and to the jury, that no individual was named by the United States Attorney in his argument, but that if he had mentioned an individual, then the Court would concur with Mr. Kay. Instead of just overruling the objection, the Court has explained in the presence of the jury the actual limits of the rule. Counsel for appellants then responded:

> "Mr. Kay. They refer to the three individuals at this counsel table and no one else."

This comment was obviously provoked by the Court in using the word "individual" in the first place, and we submit this represented the ultimate that we could do under the circumstances to point out any possible error to the Court. The Court then indicates, again in the presence of the jury, that the United States

Attorney had been, in fact, referring to the three individuals at the table of defendant's counsel, by saying:

"The Court. Of course, that is true."

At this point, we submit that reversible error had been committed, and the error was possibly irretrievable. If it would be error for the prosecuting attorney to make such a comment, it would be even more prejudicial to the appellants for the trial Court to join in the comment. However, the Court made no effort to correct the situation by an instruction to the jury that this colloquy should be ignored, nor did the Court adequately instruct the jury on this point at all; in fact, the Court failed to attempt to correct the matter in any fashion whatsoever.

This Court has already passed on this precise error in *Smith v. United States* (C.A. 9th, 1959), 268 F. 2d 416. Smith was a co-defendant of appellants here, but his appeal come on to be heard much earlier because the trial Court kept under consideration a motion for judgment of acquittal on behalf of the present appellants. In considering the appeal of Smith, this Court said:

> "Error is also predicated upon the failure of the court to make plain to the jury, by admonition to the United States Attorney or specific instruction to the jury, that a defendant is not required to produce evidence against himself or in his defense, and that the failure of the defendant to testify cannot be commented upon or referred to in argument."

Continuing, the Court said:

"While there was a general instruction, buried among the rest that defendants had a right to elect not to take the witness stand and that the jury should draw no unfavorable inference against them on that account, this instruction was not sufficiently connected nor sufficiently forceful to overcome the reference by the prosecuting attorney to defendants and their failure to rebut the evidence against them. Wilson v. United States, 149 U.S. 60.

In Bruno v. United States, 308 U.S. 287, 292-293, it was said: 'The accused could "at his own request but not otherwise be a competent witness. And his failure to make such a request shall not create any presumption against him." Such was the command of the law-makers. The only way Congress could provide that abstention from testifying should not tell against an accused was by an implied direction to judges to exercise their traditional duty in guiding the jury by indicating the considerations relevant to the latter's verdict on the facts.'

In Langford v. United States, 9 Cir., 178 F. 2d 48, the prosecuting attorney improperly drew the attention of the jury to the failure of defendant to take the stand not once but twice. At no time did counsel for the defense except to the comments of the prosecutor. On the second occasion, the court itself interposed and told the jury to disregard the comments of the government. Bruno v. United States, supra, was distinguished in that no instruction was requested correctly stating the right of the accused not to take the stand. Since exception was not taken and it did

not appear, in view of all the circumstances of the case, that defendant was sufficiently prejudiced to require the court to take notice of the remarks of the prosecutor as plain error, the verdict below was allowed to stand. The court stated in passing that: 'Had defendant saved the point by proper objection, the instructions given would not have cured the error. But again, when given an opportunity to make their objections to the charge as given, before the jury retired, counsel for defendant stated none.' Page 55."

The Court concluded:

"This court is of the opinion that these two failures of the court to instruct when the matter was called to its attention constitute, under the situation in this case, reversible error."

We submit that the conclusion of the Court was proper and that it is as applicable to Ing and Wright as it was to Smith.

CONCLUSION.

The errors complained of in these appeals are such as require reversal of the judgments below, and the granting of judgments of acquittal.

The testimony of the accomplices was completely uncorroborated. Under Alaska law, therefore, convictions based on such evidence cannot be allowed to stand.

The United States Attorney and the Court erred in their handling of comments made to the jury by the

United States Attorney concerning the failure of the defendants to testify.

Because of these errors, the judgments should be reversed.

Dated, Anchorage, Alaska,
October 28, 1959.

Respectfully submitted,
WENDELL P. KAY,
Attorney for Appellants.

No. 16,199

IN THE

United States Court of Appeals

For the Ninth Circuit

JAMES BURTON ING and
RAYMOND WRIGHT,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court, District of Alaska, Third Division.

BRIEF FOR APPELLEE.

WILLIAM T. PLUMMER,
United States Attorney,
JAMES R. CLOUSE, JR.,
Assistant United States Attorney,
Federal Building, Anchorage, Alaska,
Attorneys for Appellee.

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No. 16,199

IN THE

United States Court of Appeals

For the Ninth Circuit

JAMES BURTON ING and
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Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court, District of Alaska, Third Division.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

On October 29, 1957, the appellants were indicted by the Grand Jury for the Third Judicial Division, District of Alaska, along with Charles E. Smith, John Walker, Dewey Taylor and Lemuel Ashley Williams, in a twenty count indictment charging the defendants with uttering and publishing forged checks in violation of section 65-6-1 ACLA 1949 (R 3-33). The appellants were named in each of the twenty counts of the indictment. The trial of the appellants was completed on February 28, 1958, at which time appellant

Ing was found guilty on each of the twenty counts (R 34-35) and appellant Wright was found guilty on Counts VI through XVIII of the indictment and acquitted on the remainder of the charges (R 35-37).

On March 5, 1958, appellant Ing was sentenced to fifteen (15) years on each of the twenty counts of which he had been convicted, the sentences to run concurrently, and appellant Wright was sentenced to serve twelve (12) years on each of the thirteen counts of which he had been convicted, his sentences also to run concurrently (R 37-40).

The District Court had jurisdiction of the indictment and of the trial by virtue of the provisions of Sections 53-1-1, 53-2-1, and 65-6-1 of the Alaska Compiled Laws Annotated, 1949. Jurisdiction is conferred on this Court by Sections 1291 and 1294, Title 28 U.S.C.

STATEMENT OF FACTS AND PROCEDURE.

The principal witness called by the prosecution in its case against the appellant Ing was Claude Kenneth Brownfield, of Chicago Ridge, Illinois, who was at that time under a five count indictment for possessing forged checks and as a habitual criminal. Brownfield stated, as a witness, that he first became acquainted with appellant Ing sometime the latter part of February or early part of March, 1956, when Brownfield was introduced to Ing in a tavern in Chicago, and that during the ensuing two weeks, conversations were held concerning appellant Ing's attempt to get some-

thing lined up in the form of checks in Alaska (R 477-478). At this time Brownfield stated to Ing, in response to Ing's query, that he would be interested in taking part in such activity. Ing informed Brownfield that he would contact him about the matter later.

Sometime during the months of April, May, June and July of 1956, Brownfield received one or two letters from Ing with instructions as to the time he and others were to arrive in Fairbanks, Alaska, that he would be contacted by a friend of Ing's in Chicago who would give to Brownfield the checks they were to "pass", and that he should contact two friends in Peoria by the names of Hausam and Eckley (R 479-480). These letters were later destroyed by Brownfield.

Brownfield related that, in accordance with the instructions contained in Ing's letters, a package was delivered to him by a fellow he did not know and that this package contained a check protector, two birth certificates, and approximately four hundred checks that appeared to be Morrison-Knudsen payroll checks. These items were brought to Alaska by Brownfield, in the company of Mr. Eckley and Mr. Hausam, when they flew to Fairbanks and were then delivered to appellant Ing, approximately August 27, 1956. The checks which were delivered to Brownfield and later by him to Ing, appeared to be Morrison-Knudsen payroll checks, drawn on the First National Bank of Anchorage, signed by Guy M. King and listed the home office as Boise, Idaho. Appellant Ing showed Brownfield a genuine Morrison-Knudsen payroll

check and pointed out to Brownfield the difference in the two (R 481-483).

During this same conversation between Brownfield and appellant Ing, Ing informed the witness how the checks were to be passed over the Labor Day week-end and what Brownfield was to do after passing the checks. Ing and Brownfield then typed in the names and the amounts of the checks and ran them through the check protector. Also at this time, Ing took a picture of Brownfield and pasted it onto an identification card which identified him as Charles Lappa and was given to Brownfield to use in passing the checks. The birth certificates (R 485), the identification card (R 487) and driver's license (R 488) were introduced into evidence and the appellee's exhibits, one through nineteen and twenty-one were identified by the witness as being those brought to Alaska by him (R 491).

George W. Hooker, Assistant Hotel Manager at the Westward Inn, Anchorage, was called as a witness by the appellee who testified that on the 31st day of August 1956, their business records indicated that there was registered at the Westward Inn, 5th and Gamble, Anchorage, Alaska, James Ing and wife, Fairbanks (R 456). M. E. Dankworth, relating the admissions of Charles E. Smith, testified that Smith had stated that upon his arrival in Anchorage, he and Mr. Volk had stopped at the Westward Inn, where they parted company, then Smith had proceeded to a nearby bar to wait for Mr. Volk, and then a short time later Mr. Volk arrived at the bar with a bag, two packages of M-K checks and an identification card

which he had seen in Fairbanks, and upon which the picture of him that had been taken by Ing was pasted (R 408-409).

Defendant John Walker, called by the appellee, testified that on or about the 11th day of August, 1956, he had a conversation with appellant Wright who asked if he, Walker, would be interested in "trying to make some big money" to which he replied that he would (R 414-415). On the 29th day of August, Walker was again in the company of Wright when appellant Ing came by the building Walker was working on for Wright, picked up Wright and drove off. Approximately twenty-five to thirty minutes later Wright returned and stated to Walker that everything was okay (R 416). Subsequently, at the Beachcombers, Ing took a picture of Walker which was pasted on an identification card. This card was later returned to Walker when he arrived in Anchorage the Labor Day week-end (R 418), in the company of appellant Wright and defendant Taylor.

Upon the arrival in Anchorage, defendant Taylor and Walker stayed at a residence on 18th Street while appellant Walker stayed at the residence of Eli Williams (R. 374-419). The next morning, (Saturday) appellant Wright picked up Taylor and Walker, had breakfast, and drove to Fifth and Gambell where Wright got out of the car and went in the hotel. Then he came out and he had a package containing an identification with Thomas A. Brown on it, which was given to Walker along with some checks by Wright. The identification card was the

same as the one made at the Beachcombers in Fairbanks (R 421). Detailed statements as to the procedure of passing the checks was then elicited from the witness as were statements pertaining to the return trip to Fairbanks (R 419-427). Walker further testified the money obtained from the checks was given to Wright in Anchorage. However, the items purchased at the time the checks were passed were transported to Wright's house in Fairbanks. At that time Wright gave Walker approximately fifteen hundred dollars ($1500.00) of the money illegally obtained in Anchorage, as a result of the passing of false and forged checks (R 423-427-428).

Both appellants moved for judgments of acquittal at the close of the Government's evidence; however, the Court reserved decision (R 564-565). All defense counsel rested their cases, closing arguments were had and the case was submitted to the jury, who returned verdicts of guilty.

These appeals followed the verdicts of the jury, judgments, and sentences of the Court.

ARGUMENT.

I.

A. AND B. THERE IS AMPLE EVIDENCE TO CORROBORATE THE TESTIMONY OF THE ACCOMPLICES, THEREFORE, THE COURT DID NOT ERR IN REFUSING TO GRANT MOTIONS FOR JUDGMENTS OF ACQUITTAL.

The appellee will concede that the witnesses Taylor and Walker were accomplices within the meaning of Section 66-13-59 ACLA 1949 which reads as follows:

> "That a conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely shows the commission of the crime or the circumstances of the commission."

The appellee does not concede that witness Brownfield was an accomplice within the purview of the statute. This is discussed in detail under part C of this same heading. If this Honorable Court agreed with the contention of the appellee that witness Brownfield was not an accomplice, then there can be no question as to the sufficiency of the corroboration. If this Honorable Court is of the opinion that the witness Brownfield was an accomplice within the purview of the statute there is ample corroboration.

George W. Hooker, assistant manager of the Westward Inn at Anchorage, testified that appellant Ing was in the Anchorage area and had stayed at his hotel from August 31, 1956, through September 2, 1956, and testified as to a long distance telephone call made by the appellant Ing (R 455-457). Proof of

defendant's presence near the scene of the crime constitutes sufficient corroboration when it tends to connect the defendant to the offense and identifies the accused as the criminal the accomplice says he is. *State v. Harmon,* ..... Mont. ....., 340 P. 2d 128 (1959); *Tidewell v. State,* 37 Ala. App. 228, 66 So. 2d 845; *Fries v. People,* 80 Colo. 430, 252 Pac. 341; *Harper v. Commonwealth,* 211 Ky. 346, 277 S.W. 457; *Smith v. Commonwealth,* 242 Ky. 399, 46 S.W. 2d 513; *Moore v. State,* 30 Ala. App. 304, 5 So. 2d 644. Witness Brownfield testified appellant Ing gave him an identification card and a driver's license to be used in cashing the checks in the Fairbanks area (R 486-488). The driver's license was admitted in evidence as Government Exhibit No. 28 (R 488). (Appellee's exhibit No. 1.) Physical examination of the driver's license with the naked eye reveals that the name "James B. Ing" had been partially erased as the name of the party to whom the license had been issued, and the name Charles Wright filled in. Slight evidence, identifying the defendant with the commission of the crime, will corroborate the testimony of the accomplice. *People v. Taylor,* 70 Cal. App. 239, 232 Pac. 998; *People v. Baillie,* 133 Cal. App. 508, 24 Pac. 2d 528; *Gibson v. State,* 84 Ga. App. 417, 65 S.E. 2d 818.

Eli Williams testified that appellant Wright was in the Anchorage area and stayed in his home over the Labor Day week-end of 1956 (R 371). Ernest Yokeley testified that he was present in the home of Eli Williams and at that time appellant Wright, John

Walker, Dewey Taylor, co-defendants in this case, were also present (R 556). In determining whether the testimony of the accomplice is sufficiently corroborated, the defendant's entire conduct may be considered. *People v. Griffin,* 98 Cal. App. 2d 1, 219 Pac. 2d 519.

C. THE WITNESS BROWNFIELD WAS NOT AN ACCOMPLICE AS A MATTER OF LAW AND THE QUESTION WAS PROPERLY SUBMITTED TO THE JURY UNDER PROPER INSTRUCTIONS.

The Alaska Court has already ruled on the test to be applied in determining whether a party is an accomplice within the meaning of the Alaska Statute. In *Ex parte Jackson,* 6 Alaska, 726, Judge Reed at page 730 said:

> "The great weight of authority is to the effect that an accomplice is one who aids or abets or encourages the crime of which defendant is accused, and the usual test by which to determine whether one is an accomplice is whether or not he could be indicted and punished for the crime with which defendant is charged, or, as it is sometimes expressed, whether his participation in the offense was criminally corrupt."

This instruction has been approved by this Honorable Court. *Stephenson v. U. S.,* 211 F. 2d 702 (9th Cir. 1954.) This is the law that is followed in most jurisdictions. *State v. Durham,* 75 N.W. 1127 (Minn. 1898); *Levering v. Commonwealth,* 117 S.W. 253 (Ky. 1909); *People v. Hrdlicka,* 176 N.E. 308 (Ill. 1931).

The Alaska Statute which the appellants are alleged to have violated is 65-6-1 ACLA 1949. The Statute

designated two crimes, that of forgery and that of uttering. These are separate and distinct crimes. *Wiley v. U. S.*, 144 F. 2d 707 (9th Cir. 1944); *DeMaurez v. Squier, Warden,* 144 F. 2d 564 (9th Cir. 1944).

The relation between the forger and the one passing the forged instrument knowing it to be forged is like that existing between a thief and one receiving the property knowing it to be stolen. It has been held that one is not an accomplice to the other. In this case there was no aiding and abetting between Brownfield and appellants, nor was there mutual consent or knowledge for the specific acts of uttering and passing the forged checks which would be essential to classify them as accomplices. *State v. Phillips,* 127 Mont. 381, 264 P. 2d 1009.

The evidence discloses that the witness Brownfield participated with the appellant Ing and with uttering some of the forged checks in the Fairbanks area, but had no connection with the uttering scheme in the Anchorage area, the crime for which the appellants were indicted and had been convicted. Applying the testimony set out in *Ex parte Jackson,* supra, it is obvious that the witness Brownfield could not, as a matter of law, be ruled to be an accomplice. It is true that Brownfield had some general knowledge of the Anchorage operation and that perhaps he was morally delinquent in not exposing that scheme. However, evidence of Brownfield's participation in the crime of uttering in the Anchorage area in any material way does not exist.

"The burden of proving the witness to be an accomplice is, of course, upon the party alleging it for the purpose of invoking the rule, namely, upon the defendant. Whether the witness is in truth an accomplice is left to the jury to determine and if they conclude him to be such, then and only then are they to apply the rule requiring corroboration."

Wigmore on Evidence, 3rd Edition, Vol. 7, Sec. 2060, (e) page 341;

State v. Akers, 74 P. 2d 1138 (Montana 1938);

Ripley v. State, 227 S.W. 2d 26 (Tenn. 1950);

Darden v. State, 68 So. 550 (Alabama 1915).

In the present case, the appellants failed to show by the evidence that the witness Brownfield was an accomplice. From the prosecutor's evidence and Brownfield's testimony, Brownfield could not be ruled to be an accomplice as a matter of law. The appellants put on no evidence to show he was an accomplice. Whether the witness was an accomplice was properly submitted to the jury under proper instructions and their determination is and should be final.

II.

THE UNITED STATES ATTORNEY DID NOT COMMENT ON THE FAILURE OF THE APPELLANTS TO TAKE THE WITNESS STAND AND THE COURT DID NOT ERR IN FAILING TO INSTRUCT THE JURY CONCERNING THE REMARKS OF THE UNITED STATES ATTORNEY.

At page 271 of the Smith transcript (U. S. Court of Appeals for the Ninth Circuit, No. 16,041) you will

find the following comments of the United States Attorney made in final argument:

> "Now, there's also much innuendo about the reliability of the Government's evidence. I say, and you know, it's the only evidence you have. If they didn't feel that it was reliable, why didn't they put on some evidence? Why didn't they put some evidence on? You have no choice; you have no evidence or no testimony other than that adduced by the Government witnesses, and by the Government. . . .
>
> Mr. Kay. I hesitate to interrupt Mr. Plummer's argument, but I want to register an objection to that line of argument as tending to violate the constitutional right the defendant may have.
>
> The Court. Well——
>
> Mr. Plummer. I didn't mention anybody, except why didn't they put on a defense?
>
> The Court. That is correct. Objection overruled. If it had referred to an individual, then I would concur, Mr. Kay.
>
> Mr. Kay. They refer to the three individuals at this counsel table and no one else.
>
> The Court. Of course, that is true.
>
> Mr. Plummer. I didn't say . . . may counsel approach the bench a moment?
>
> The Court. I don't think it is necessary, counsel. Let's proceed.
>
> Mr. Plummer. Fine. Now, also, I think . . ."

No requested instructions to disregard the comments of the District Attorney was made by any of the counsel.

The comments of the District Attorney could not be construed as a comment on the failure of the appel-

lants to take the stand. Any error that was induced was induced by the comments of the counsel for the defendant Ing, in calling to the Court's attention in the presence of the jury that the comment referred to the three defendants. It appears that the attorneys for the three co-defendants agreed and the Court approved that the objection of one counsel would constitute objections for the three defendants on trial (R 57) (U.S. Court of Appeals for the Ninth Circuit No. 16,041). An examination of the authorities in this area would seem to indicate that the remarks of the United States Attorney in this instance would be proper. *Johnson v. United States,* 5 F. 2d 471, 475 (4th Cir. 1925); *Slakoff v. United States,* 8 F. 2d 9, 11 (3rd Cir. 1925); *Lias v. United States,* 51 F. 2d 215, 218 (4th Cir. 1931); *Morgan v. United States,* 31 F. 2d 385, 388 (7th Cir. 1929); *Lefkowitz v. United States,* 273 Fed. 664, 668 (2nd Cir. 1921); *Jackson v. United States,* 102 Fed. 473, 487 (1900); *Bilodeau v. United States,* 14 F. 2d 582, 586 (1926); *Robilio v. United States,* 291 Fed. 975, 985 (6th Cir. 1923).

In the instant case, the Government evidence was uncontradicted in all aspects. The comments of the District Attorney merely called attention to this fact. Nowhere was there any reference made to the failure of the appellants to testify. There is no showing by the appellants that the only evidence available to rebut the Government's case would have to come from him. The only adverse comments was that made by the counsel for the defendant Ing, who apparently at this point in the trial was acting for and on behalf of the

appellant. It has been held that the action of the defendant's counsel in misconstruing the comments of the prosecutor cannot be attributed to the Government. *State v. O'Brien*, 77 So. 2d 402, 405 (La. 1954).

CONCLUSION.

For the reasons stated, there was no prejudicial error committed at the appellants' trial. Therefore, the verdict of the jury and judgment of the trial court should be affirmed.

Dated, Anchorage, Alaska,
January 15, 1960.

Respectfully submitted,

WILLIAM T. PLUMMER,
United States Attorney,
JAMES R. CLOUSE, JR.,
Assistant United States Attorney,
Attorneys for Appellee.

No. 16200

United States
Court of Appeals
for the Ninth Circuit

JOHN O. ENGLAND, Trustee of the Estate of J. J. KIMBLE, Bankrupt,

Appellant,

vs.

AMERICAN TRUST COMPANY,

Appellee.

Transcript of Record

Appeals from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—12-19-58

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

STANLEY M. McLEOD,
1015 Hearst Building,
San Francisco 3, California,

For Trustee and Appellant.

BROBECK, PHLEGER & HARRISON,
HOWARD J. FINN,
DAVID W. LENNIHAN,
111 Sutter Street,
San Francisco 4, California,

For Petitioner, American Trust Company.

In the Southern Division of the United States District Court for the Northern District of California.

No. 46274—In Bankruptcy

In the Matter of

J. J. KIMBLE,

Bankrupt.

PROOF OF CLAIM UNDER SECTIONS 62 AND 64a(3) OF BANKRUPTCY ACT

State of California,
City and County of San Francisco—ss.

T. C. Hudelson of the City and County of San Francisco, being first duly sworn, deposes and says:

1. That he is an Assistant Vice President of American Trust Company, a corporation duly organized and existing under the laws of the State of California and carrying on business at 464 California Street, San Francisco, California, and is duly authorized to make this Proof of Claim on its behalf.

2. That American Trust Company is a creditor of the above-named bankrupt and has heretofore and on September 14, 1956, filed herein a proof of claim.

3. That this proof of claim is in addition to said proof of claim heretofore filed.

4. That on or about September 14, 1956, claimant did file herein its Specifications of Objections

to Discharge; that said Specifications of Objections to Discharge did regularly come on for hearing on October 31, 1956, at which time, after proofs had been taken and evidence introduced, leave was granted to American Trust Company to file an amendment to its Specifications of Objections to Discharge and the cause was submitted; that on November 9, 1956, American Trust Company did file herein its amendment to its Specifications of Objections to Discharge; that said Specifications of Objections to Discharge, as amended, are as of this date under submission before this Court pending determination thereof.

5. That American Trust Company did employ as its attorneys for the purpose of representing it in the proceedings for Objections to Discharge the firm of Brobeck, Phleger & Harrison, 111 Sutter Street, San Francisco 4, California, and has incurred an obligation to said firm for the payment of its attorneys' fees chargeable to said representation; that the amount of said attorneys' fees is $750.00 and is the reasonable value of the services rendered by said firm.

6. That in the event the above-named bankrupt's discharge is refused herein, such refusal shall be the result of the efforts of American Trust Company at its cost and expense.

7. That the cost and expense of American Trust Company in connection therewith consists of the following items:

$10.00, paid to Carolyn R. Blair, official reporter of the Referee herein, for transcripts of the testimony of the bankrupt given at various hearings.

$10.00, paid the Clerk herein as and for the filing fee for filing its Specifications of Objections to Discharge.

$1.50, paid Notary Public for verification of Specifications of Objections to Discharge, Amendment thereto, and Affidavit of David W. Lennihan filed pursuant to §62 of Bankruptcy Act.

$750.00, amount of fee of its attorneys as above set forth.

8. That such costs and expenses constitute a debt of the third priority as provided in Section 64a(3) of the Bankruptcy Act.

Wherefore, American Trust Company prays that the amount of said debt, to wit: the sum of $771.50, shall be retained by the Trustee herein until a final judgment granting or denying the discharge of the above-named bankrupt shall be made and entered, and that upon such final judgment the amount so retained shall, if such discharge be refused, forthwith be paid to American Trust Company and shall, if such discharge be granted, be disbursed in the ordinary course of administration.

/s/ T. C. HUDELSON,
Assistant Vice President.

Subscribed and sworn to before me this 20th day of February, 1957.

[Seal] /s/ MAUDE W. NASH,
Notary Public in and for the City and County of San Francisco, State of California.
My Commission Expires October 14, 1958.

Receipt of copy acknowledged.

[Endorsed]: Filed February 21, 1957. Referee.

[Title of District Court and Cause.]

AFFIDAVIT OF ATTORNEYS FOR AMERICAN TRUST COMPANY, A CREDITOR HEREIN

State of California,
City and County of San Francisco—ss.

David W. Lennihan of the City and County of San Francisco, being first duly sworn, deposes and says:

1. That he is one of the attorneys for American Trust Company herein and is an associate of the firm of Brobeck, Phleger & Harrison;

2. That said firm was retained by American Trust Company to represent it and conduct proceedings to obtain denial of the discharge in bankruptcy of the above-named bankrupt;

3. That he did conduct such proceedings and in connection therewith did examine said bankrupt at the first meeting of creditors herein and at the hear-

ing on the Specifications of Objections to Discharge of American Trust Company herein;

4. That he did make other and further investigations of the facts material to said Specifications of Objections to Discharge; that he did prepare, serve and file said Specifications of Objections to Discharge and, with leave of this Court, an amendment thereto;

5. That he did make an examination of the authorities pertaining to the right of said bankrupt to discharge, in order to be able to urge upon the Court that such discharge should be denied;

6. That the reasonable value of the services rendered by the firm of Brobeck, Phleger & Harrison, as above set forth, is $750.00;

7. That no agreement nor understanding of any kind exists between said firm or American Trust Company and any other person whatever for a division of the compensation to which said firm is entitled for its services.

/s/ DAVID W. LENNIHAN.

Subscribed and sworn to before me this 20th day of February, 1957.

[Seal] /s/ MAUDE W. NASH,
Notary Public in and for the City and County of San Francisco, State of California.
My Commission Expires October 14, 1958.

Recipt of copy acknowledged.

[Endorsed]: Filed February 21, 1957, Referee.

[Title of District Court and Cause.]

ORDER SUSTAINING SPECIFICATIONS OF OBJECTIONS TO BANKRUPT'S DISCHARGE IN BANKRUPTCY AND DENYING SUCH DISCHARGE

It Appearing, and the court so finds, that J. J. Kimble, of the County of San Mateo, State of California, duly was adjudged a bankrupt, on a petition filed in the above-entitled court on March 15, 1956, and

It Further Appearing that, on October 31, 1956, after a hearing held the same day (after due notice to all directly interested persons) on the "Specification of Objections to Discharge" filed in the above-entitled matter on September 14, 1956, the opposition to the bankrupt's discharge was submitted for decision and judgment, after the opposing creditor, American Trust Company, had been granted permission to amend said specifications to conform to proof, and

It Further Appearing that said amendment since has been filed, and

It Further Appearing and the court so finds that the allegations set forth in the "Amendment to Specifications of Objections to Discharge" are true and correct and the court therefore, concludes, as matters of law, that said last mentioned specifications should be sustained and the bankrupt is not entitled to a discharge in bankruptcy,

It Hereby Is Ordered, Adjudged and Decreed:

1. That the aforesaid specifications, as amended, be, and they are, hereby Sustained, and

2. That the bankruptcy discharge of J. J. Kimble, the above-named bankrupt be, and said discharge is, Denied.

Dated: August 22nd, 1957.

/s/ BURTON J. WYMAN,
Referee in Bankruptcy.

[Endorsed]: Filed August 22, 1957, Referee.

[Endorsed]: Filed August 27, 1957, U.S.D.C.

[Title of District Court and Cause.]

TRUSTEE'S OBJECTIONS TO PRIORITY CLAIM OF AMERICAN TRUST COMPANY

To the Honorable the District Court of the United States for the Above-Entitled District, and Burton J. Wyman, Esq., Referee in Bankruptcy Thereof at San Francisco:

Now comes John O. England, Trustee in Bankruptcy of the estate of the above-named bankrupt, and objecting to the claim of the American Trust Company filed herein on or about the 21st day of February, 1957, in the sum of $771.50 as a debt of the third priority as provided in Section 64a(3) of the Bankruptcy Act, as grounds of objections alleges:

1. That said claim consists of the sum of $21.50 representing notary fees, reporter's fees and filing fees expended by said claimant in filing and prosecuting its Specifications of Objections to the Discharge of the above-named bankrupt, which Discharge has, as a result of such Objections, been denied; That said claim further consists of the sum of $750.00 being the amount of attorneys' fees incurred by claimant and which it is obligated to its attorneys, Brobeck, Phleger & Harrison, in the prosecution of said Objections to Discharge of the bankrupt; That your peitioner objects to said claim on the ground that it is not properly allowable in this proceeding for the reason that the estate of said bankrupt was not, in any way, benefitted by the actions of said claimant and the services rendered it by its said attorneys.

Wherefore, your trustee prays that said proof of claim be re-examined and following a hearing of the within objections an Order be made denying said claim, as entitled to priority or otherwise, to payment from the assets of this bankrupt estate, and for such other and further Order as may be proper.

/s/ JOHN C. ENGLAND,
Trustee.

/s/ STANLEY M. McLEOD,
Attorney for Trustee.

Duly verified.

[Endorsed]: Filed October 30, 1957, Referee.

[Title of District Court and Cause.]

STIPULATED FACTS IN CONNECTION WITH CLAIM OF AMERICAN TRUST COMPANY FOR REIMBURSEMENT UNDER SECTION 64A(3) OF THE BANKRUPTCY ACT.

1. The bankrupt was so adjudicated pursuant to a voluntary petition filed by him. American Trust Company, the claimant, is an unsecured creditor of the bankrupt's estate. Its claim was duly filed herein and allowed.

2. On June 26, 1956, the Referee in Bankruptcy gave to the claimant, the other creditors of the estate, the Trustee in Bankruptcy and the United States Attorney notice of the last day fixed by the Referee for the filing of objections to the bankrupt's discharge in the manner required by § 58B of the Bankruptcy Act.

3. The claimant believing that grounds existed for the refusal of the bankrupt's discharge retained attorneys and requested them on its behalf to initiate appropriate proceedings to obtain refusal of the bankrupt's discharge. Claimant's decision to retain attorneys was in fact a reasonable and proper one since it could not properly represent itself in connection with such proceedings and the attorneys selected by claimant to represent it were qualified and competent to do so.

4. Claimant did not seek or obtain approval from the Referee in Bankruptcy of its decisions to oppose

the discharge of the bankrupt and to retain attorneys to represent it in connection therewith, or of the qualifications of the attorneys selected by it.

5. The bankrupt's discharge was refused after the hearing on specifications of objections thereto filed by claimant and such refusal was obtained solely through the efforts and at the cost and expense of claimant. The costs and expenses of claimant incurred and paid in connection with its efforts to obtain refusal of said discharge amounted to $771.50, which included an attorneys' fee paid by it to its attorneys. The amount of said fee was reasonable.

6. No other creditor or party in interest filed specifications of objections to the discharge of the bankrupt or in any wise participated in proceedings to obtain refusal of such discharge.

7. The trustee in bankruptcy was not requested by claimant to conduct proceedings to obtain refusal of the bankrupt's discharge and said trustee did not conduct or in any wise participate in such proceedings.

8. The claimant duly filed its claim to be reimbursed for its said expenses incurred and paid in connection with its efforts to obtain refusal of the bankrupt's discharge, basing its claim upon the provisions of § 64A(3) of the Bankruptcy Act (11 U.S.C.A. § 104(a)(3)).

The foregoing statement of facts is stipulated to be true.

BROBECK, PHLEGER & HARRISON,
Attorneys for Claimant.

/s/ STANLEY M. McLEOD,
Attorney for Trustee.

Approved:

/s/ BURTON J. WYMAN,
Referee in Bankruptcy.

[Endorsed]: Filed November 26, 1957. Referee.

[Title of District Court and Cause.]

PETITION FOR REVIEW

To: The Honorable Burton J. Wyman, Referee in Bankruptcy.

The petition of American Trust Company, a corporation, respectfully shows:

1. Your petitioner is aggrieved by the Order, Judgment and Decree of Burton J. Wyman, Referee in Bankruptcy, a copy of which Order is attached hereto as Exhibit A and made a part hereof by reference.

2. The Referee erred in respect to said Order in that:

A. The language of the Order, page 10 lines 19 through 26, as follows:

> "Had the trustee been the one who initiated and successfully carried forward the opposition

to the bankrupt's discharge and had the work of his attorney, in this regard, been of the same as that performed by the attorneys representing said creditor-bank, the court would have found, and allowed, as a reasonable fee for such services, the sum of $250.00, and no more, an extremely liberal allowance for the same kind of legal services as were performed herein!"

is contrary to the stipulated facts approved in writing by the Referee and is directed to an issue previously determined in favor of your petitioner.

B. Said Order, Judgment and Decree disregards the plain mandate of § 64A(3) of the Bankruptcy Act (11 U.S.C.A. 104A(3)).

Wherefore, your petitioner prays that said Order be reviewed by a Judge in accordance with the provisions of the Act of Congress relating to bankruptcy; that said Order be reversed; that the claim of petitioner under §§ 62 and 64A(3) of the Bankruptcy Act be allowed in full, and that your petitioner have such other and further relief as is just.

Dated: April 2, 1958.

AMERICAN TRUST COMPANY,

By /s/ T. C. HUDELSON,
Assistant Vice President.

/s/ DAVID W. LENNIHAN,
Attorneys for Petitioner.

Receipt of copy acknowledged.

[Endorsed]: Filed April 7, 1958, Referee.

In the Southern Division of the United States District Court, for the Northern District of California

No. 46274

In the Matter of

J. J. KIMBLE,

Bankrupt.

Before: Honorable Burton J. Wyman,
Referee in Bankruptcy.

Thursday, November 14, 1957. 2:00 P.M.

OBJECTION TO CLAIM OF
AMERICAN TRUST COMPANY

Appearances:

For the Trustee:
STANLEY M. McLEOD, ESQ.

For the Claimant:
DAVID W. LENNIHAN, ESQ.,
Representing MESSRS. BROBECK,
PHLEGER & HARRISON.

The Referee: Matter of the Objection to Claim of American Trust Company in the Kimble Matter.

Mr. McLeod: Ready.

The Referee: What are you claiming that under?

Mr. Lennihan: Section 64a(3) of the Bankruptcy Act.

The Referee: Read it to me.

Mr. Lennihan: I am reading an excerpt.

The Referee: I have it right here.

Mr. Lennihan: "The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be - - - - (3) where (skipping) the bankrupt's discharge has been refused (skipping) upon the objection and through the efforts of one or more creditors (skipping) the reasonable costs and expenses of such creditors in obtaining such refusal."

The Referee: Funny; the latest amendment I have does not have that in.

Mr. McLeod: It was amended in 1949.

Mr. Lennihan: This has been in since 1938.

The Referee: I think you are away off.

Mr. McLeod: I copied it word for word just as you read it.

The Referee: Section 19. Clause a is amended to read——

Mr. Lennihan: Section 19 of what?

The Referee: Section 19; clause (1) subdivision a has been amended. [2*]

Mr. Lennihan: This is easy. I am dead right or dead wrong.

The Referee: I think you are dead wrong.

Mr. Lennihan: May I examine the statute? Is that all of the amendment?

The Referee: This is the amendment to the stat-

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

ute right there. The only person entitled to it now is the trustee.

Mr. Lennihan: I know the statute is as I read it.

The Referee: As it was.

Mr. Lennihan: "Subdivision a of Sec. 64 is amended to read as follows: (1)."

Well, that does not affect (3). Therefore (3) is as I read it. This is Subdivision a(1). I was reading Subdivision a(3).

Mr. McLeod: It is Subdivision a(3) that his application is based on. So far as I was able to determine, he is reading the correct language.

Mr. Lennihan: And not reading Section 64a(1), which has no bearing.

The Referee: Let's get the file itself and see what we have.

Mr. Lennihan: This is the first priority; then there is a second priority, wage claims; then a third priority upon which I rely.

Mr. McLeod: Which you just read?

Mr. Lennihan: Which I just read. There is a fourth priority, which is taxes.

The Referee: Wait a minute. Maybe I am wrong.

Mr. McLeod: I might say, Your Honor, I just copied this from Remington today. It says:

"Since the 1938 amendment of the Bankruptcy Act, certain attorneys fees for services rendered to creditors are undoubtedly allowable out of the estate, under a special third priority rating according to the costs and expenses of creditors in obtaining the refusal, revocation or vacation of the bankrupt's

discharge, defeating confirmation of an arrangement or wage earner's plan, and also accorded to the expense of any person producing evidence resulting in conviction of any person of certain offenses under the Act."

There was only one point in connection with this. Assuming that is the law, and the creditor is entitled to reimbursement of all costs and expenses of that person, including attorney's fees, the question arises in my mind whether or not such creditor must request the trustee to oppose the discharge first. If he refuses to take such action, then, secondly, whether or not the creditor or his attorney must apply to the court before proceeding.

Those are the only two facts that occur to me. I mean, there was some question about the right to attorney's fees and reimbursement.

The Referee: Well, the Act as I have it here does not concern that either. Oh, yes it does. I think your point is good on the other.

Mr. McLeod: I wondered about that. I don't like to object, even on technical grounds.

The Referee: I believe in technicalities. I think every court should apply the statute to the limit. I will give you time to look that up.

Mr. Lennihan: Let me clarify that. Let me know what I am fighting.

The Referee: He says first you should ask the trustee to do it and if he refuses——

Mr. Lennihan: I will address the Court on that score. The expense to the estate is identical whether the trustee is the moving party or a creditor.

The Referee: It does not say so. That may be so if you can show that you asked the trustee to do it.

Mr. McLeod: I have a statement here:

"A creditor's attorney, if he hopes to be paid out of the estate for taking over and performing the trustee's duties, should at least first make a demand on the trustee, and probably should likewise obtain leave of court."

Mr. Lennihan: I don't know that I can find a case saying that Mr. McLeod is right or wrong, but in the absence of a case saying he is right, there is no equity whatever in saying that he is.

The Referee: Have you a case?

Mr. McLeod: I read one, 48 Fed. (2nd) 741.

The Referee: Whether there is a case or not, I would hold that is so. You just cannot go in and represent a creditor without showing the trustee has refused to do it. I want to see the cases. If there are any cases that do hold it, I will hold against the Bank, because I believe it only benefited the Bank, not the estate.

Mr. Lennihan: I think the Act is expressive on that subject. Whether the estate benefited is a matter of speculation, because the ultimate question is whether at any time in the future, as a result of the activities of the Bank, the creditors may receive payment, which but for their activities, they would not.

May we move to another phase of this same subject, so I will know what we are faced with?

The Referee: Surely.

Mr. Lennihan: The second question, as I see it,

once the priority of payment is settled, is: Is the trustee required to make payment on account of the expenses of the Bank? If the law is that the trustee is required to do so, then the second question is: How much should be paid? Therefore, I would like us to address our attention to that so I might know.

The Referee: I will say that if I allowed it, I would allow that amount. So that question is out.

Mr. Lennihan: That is what I wanted to know.

The Referee: If it is legally allowable.

Mr. McLeod: Personally, I have no objection one way or the other, but being the attorney for the trustee, it is technically not proper for the trustee to say that a large payment be made.

Mr. Lennihan: May we stipulate, so I will know upon what record we are proceeding, that the items and amounts stated in the claim of American Trust Company are proper, assuming that it is an allowable obligation of the estate, the sole issue being whether it is an allowable obligation of the estate?

Mr. McLeod: I will state that we have no dispute over the fact that counsel and his client performed services and the amount for fees is one chargeable by your firm to the Bank. If the Court determines that is reasonable, I am satisfied.

Mr. Lennihan: In directing the reference as to reasonableness, then, it is agreed that they are reasonable, the items included in the expenses; the sole question is, are we entitled to it?

The Referee: Under the law.

Mr. Lennihan: Of course. In other words, if I

know what I am doing, I guess the procedure would be to address a memorandum to the Court, including a stipulation of facts.

The Referee: Yes.

Mr. McLeod: That would be agreeable to me.

Mr. Lennihan: I will prepare a stipulation at this time that the amounts are reasonable, and address it to Mr. McLeod with what my views of the law are.

The Referee: Very well.

(Submitted.)

[Endorsed]: Filed April 9, 1958, Referee.

[Title of District Court and Cause.]

CERTIFICATE AND REPORT OF REFEREE RELATIVE TO PETITION FOR REVIEW OF REFEREE'S ORDER, DATED MARCH 27, 1958

To: Honorable District Judge for the Northern District of California, United States.

I, Burton J. Wyman, one of the referees in bankruptcy of the above-entitled court and the referee primarily in charge of the above-entitled bankruptcy proceeding, hereby respectfully certify and report as follows:

This specific matter in said bankruptcy proceeding now is before a Judge of the above-entitled Dis-

trict Court, sitting as an appellate court* for the purpose of hearing and determining the following verified "Petition for Review":

"To: The Honorable Burton J. Wyman, Referee in Bankruptcy.

"The petition of American Trust Company, a corporation, respectfully shows:

"1. Your petitioner is aggrieved by the Order, Judgment and Decree of Burton J. Wyman, Referee in Bankruptcy, a copy of which Order is attached hereto as Exhibit A and made a part hereof by reference.

"2. The Referee erred in respect to said Order in that:

"A. The language of the Order, page 10, lines 19 through 26, as follows:

> " 'Had the trustee been the one who initiated and successfully carried forward the opposition to the bankrupt's discharge and had the work of his attorney, in this regard, been of the same as that performed by the attorneys representing said creditor-bank, the court would have found, and allowed, as a reasonable fee for

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*"In passing upon a petition for review of a referee's order, 'the proceeding is in substance an appeal from the court of bankruptcy—i.e., the referee—to the District Court.' In re Pearlman (C.C.A.) 16 F. (2d) 20, 21."

In re Big Blue Min. Co. (D.C., N.D., Calif.) 16 F. Supp, 50, 51.

(Opinion by St. Sure, District Judge.)

such services, the sum of $250.00, and no more, an extremely liberal allowance for the same kind of legal services as were performed herein!'

is contrary to the stipulated facts approved in writing by the Referee and is directed to an issue previously determined in favor of your petitioner.

"B. Said Order, Judgment and Decree disregards the plain mandate of §64A(3) of the Bankruptcy Act (11 U.S.C.A. 104A(3)).

"Wherefore, your petitioner prays that said Order be reviewed by a Judge in accordance with the provisions of the Act of Congress relating to bankruptcy; that said Order be reversed; that the claim of petitioner under §§62 and 64A(3) of the Bankruptcy Act be allowed in full, and that your petitioner have such other and further relief as is just.

"Dated: April 2, 1958.

"AMERICAN TRUST COMPANY,

"By /s/ T. C. HUDELSON,
"Assistant Vice President.

"BROBECK, PHLEGER & HARRISON,

"/s/ DAVID W. LENNIHAN,
"Attorneys for Petitioner."

[The verification, for the sake of as much brevity as appears possible, is intentionally omitted from this certificate and report.]

The original of the complained-of "Order, Judgment and Decree Disallowing 'Proof of Claim Under Sections 62 and 64A(3) of Bankruptcy Act' " (a copy of which is attached to the aforesaid petition for review, but omitted herefrom to avoid repetition) is inserted herein and reads as follows:

[Title of District Court and Cause.]

ORDER, JUDGMENT AND DECREE DISALLOWING "PROOF OF CLAIM UNDER SECTIONS 62 AND 64a(3) OF BANKRUPTCY ACT"

This matter is before the court under the following circumstances:

On February 21, 1957, there was filed in the above-entitled bankruptcy proceeding the following "Proof of Claim Under Sections 62 and 64a(3) of Bankruptcy Act":

"State of California,
"City and County of San Francisco—ss.

"T. C. Hudelson of the City and County of San Francisco, being first duly sworn, deposes and says:

"1. That he is an Assistant Vice President of American Trust Company, a corporation duly organized and existing under the laws of the State of California and carrying on business at 464 California Street, San Francisco, California, and is

duly authorized to make this Proof of Claim on its behalf.

"2. That American Trust Company is a creditor of the above-named bankrupt and has heretofore and on September 14, 1956, filed herein a proof of claim.

"3. That this proof of claim is in addition to said proof of claim heretofore filed.

"4. That on or about September 14, 1956, claimant did file herein its Specifications of Objections to Discharge; that said Specifications of Objections to Discharge did regularly come on for hearing on October 31, 1956, at which time, after proofs had been taken and evidence introduced, leave was granted to American Trust Company to file an amendment to its Specifications of Objections to Discharge and the cause was submitted; that on November 9, 1956, American Trust Company did file herein its amendment to its Specifications of Objections to Discharge; that said Specifications of Objections to Discharge, as amended, are as of this date under submission before this Court pending determination thereof.

"5. That American Trust Company did employ as its attorneys for the purpose of representing it in the proceedings for objections to discharge the firm of Brobeck, Phleger & Harrison, 111 Sutter Street, San Francisco 4, California, and has incurred an obligation to said firm for the payment of its attorneys' fees chargeable to said representation; that the amount of said attorneys' fees is

$750.00 and is the reasonable value of the services rendered by said firm.

"6. That in the event the above-named bankrupt's discharge is refused herein, such refusal shall be the result of the efforts of American Trust Company at its cost and expense.

"7. That the cost and expense of American Trust Company in connection therewith consists of the following items:

"$10.00, paid to Carolyn R. Blair, official reporter of the Referee herein, for transcripts of the testimony of the bankrupt given at various hearings.

"$10.00, paid the Clerk herein as and for the filing fee for filing its Specifications of Objections to Discharge.

"$1.50, paid Notary Public for verification of Specifications of Objections to Discharge, Amendment thereto, and Affidavit of David W. Lennihan filed pursuant to § 62 of Bankruptcy Act.

"$750.00 amount of fee of its attorneys as above set forth.

"8. That such costs and expenses constitute a debt of the third priority as provided in Section 64a(3) of the Bankruptcy Act.

"Wherefore, American Trust Company prays that the amount of said debt, to wit: The sum of $771.50, shall be retained by the Trustee herein until a final judgment granting or denying the discharge of the

above-named bankrupt shall be made and entered, and that upon such final judgment the amount so retained shall, if such discharge be refused, forthwith be paid to American Trust Company and shall, if such discharge be granted, be disbursed in the ordinary course of administration.

"/s/ T. C. HUDELSON,
"Assistant Vice President.

"Subscribed and sworn to before me this 20th day of February, 1957.

"/s/ MAUDE W. NASH,
"Notary Public in and for the City and County of San Francisco, State of California.

"My Commission Expires October 14, 1958."

The order, judgment and decree sustaining the opposition to the bankrupt's discharge and denying such discharge was based upon the following verified "Amendment to Specifications of Objections to Discharge":

"American Trust Company of the City and County of San Francisco, State of California, a creditor of the above-named bankrupt, pursuant to Rule 15b of the Federal Rules of Civil Procedure and leave of court first had and obtained, does hereby amend to conform to the evidence its Specifications of Objections to Discharge filed herein on September 14, 1956, by adding thereto the following ground of objection:

"1. On or about August 31, 1954, said bankrupt applied to American Trust Company for a loan in the sum of $5,000.00 and for the purpose of inducing American Trust Company to make said loan said bankrupt made and published to American Trust Company a statement in writing respecting his financial condition, a true copy of which is attached as Exhibit A to the Specifications of Objections to Discharge filed by American Trust Company herein on September 14, 1956, and made a part hereof by reference.

"2. In and by said statement in writing said bankrupt represented to American Trust Company, among other things, that he was doing and did do business as a sole proprietorship in that the assets described upon said statement in writing were and would be his property as such proprietor and that the value of said assets was $15,595.00.

"3. Said representations were materially false in that, whereas on the page of said statement headed 'Application for Credit—Business Loan' under the column headed 'Assets,' said bankrupt represented that he had total assets of the value of $15,595.00, in truth and in fact the item 'Cash on Hand' represented to be $5,000.00 and the item 'Real Estate' represented to be of the value of $6,000.00, constituted one and the same asset and not separate and distinct assets and the value of the total assets of said bankrupt was and is overstated by the sum of $5,000.00.

"4. American Trust Company believed said representations and in reliance thereon loaned to said bankrupt the sum of $5,000.00.

"Wherefore, American Trust Company prays that the application of said bankrupt for discharge be denied.

"AMERICAN TRUST
COMPANY,

"By /s/ O. WILLARD FRIEBERG,
"Assistant Vice President."

* * *

In the consideration of this specific matter, the court has availed itself of the rule in federal courts that such courts can take "* * * judicial notice of its own records (Bowe-Burke Mining Co. v. Willcuts, 42 F. 2d 394, 395; The Golden Gate (C.C.A. 9) 286, F. 105, 106; Freshman v. Atkins, 269 U.S. 121, 124, 46 S. Ct. 41, 42, 70 L. Ed. 193, 195) and in so doing has found that the herein trustee's attorney who is among the "top-flight" bankruptcy attorneys in San Francisco and who frequently has rendered, as he did herein, efficient services in the performance of his duties as attorney for receivers and trustees in other bankruptcy proceedings, as well as in the above-entitled matter, by court order, was paid, in the above-entitled bankruptcy proceeding, the sum of $125.00 as compensation for the legal work performed herein in aiding the receiver in the performance of the receiver's duties and the further sum of $256.12 as compensation for the legal work

performed in aiding the trustee in the performance of said trustee's duties, i.e., a total of $381.00.

Had the trustee been the one who initiated and successfully carried forward the opposition to the bankrupt's discharge and had the work of his attorney, in this regard, been of the same as that performed by the attorneys representing said creditor-bank, the court would have found, and allowed as a reasonable fee for such services, the sum of $250.00, and no more, an extremely liberal allowance for the same kind of legal services as were performed herein.

In the light of the circumstances shown by the record herein, however, and particularly in the light of the fact that the trustee, in this bankruptcy proceeding, never was asked, by the creditor-bank, or any of its attorneys, to inform said creditor-bank, or any of its attorneys whether he would, or would not, file an opposition to the herein bankrupt's discharge, based upon the creditor-bank's ground for opposition, or otherwise,* and, also, particularly in the light of the fact that neither said creditor-bank, nor any of its attorneys, ever applied to the bankruptcy court for authority, after good cause shown, to oppose, at the expense of the bankrupt's estate, said bankrupt's discharge, this court is firmly of the opinion that, if any allowance were made to the at-

*Section 47a of the Bankruptcy Act [11 USCA, § 75a(9)] . . . provides "Trustees shall . . . . (9) oppose at the expense of estates the discharges of bankrupts when they deem it advisable to do so . . ."

torneys for said creditor-bank, a precedent would be established that later, under circumstances the same as those present herein, frequently could, and (inasmuch as said precedent almost certainly would assure, out of bankrupt's estates, the payment of attorneys' fees to attorneys not appointed by the bankruptcy courts to represent anyone officially connected with bankruptcy proceedings involved) in all likelihood, frequently would, be used to justify like "by-passings" of the bankruptcy courts, and their protective supervision over the administration of bankruptcy estates, and the funds therein involved, thereby weakening, if not making entirely ineffective, the supervision that Congress unquestionably intended should be exercised by bankruptcy courts in administering bankruptcy proceedings. In passing, it is to be noted that the supervisory power of a referee in bankruptcy matters has been referred to by the Circuit Court of Appeals for the Ninth Circuit as "sweeping." Lines v. Falstaff Brewing Co., 233 F. (2d) 927, 931.

Moreover, it is to be remembered that if the attorneys for this creditor-bank, under the circumstances and condtitions herein present, legally and properly can be allowed the sum of $750.00, or any other lesser sum, to be paid out of the assets of this bankrupt's bankruptcy estate, then unquestionably a bankruptcy court, confronted with the same character of a record, that now confronts this bankruptcy court, being bound by the hereinbefore mentioned precedent, legally would be justified in

allowing attorneys' fees to seven different sets of attorneys, who, representing seven different opposing creditors, each basing its opposition on a ground different from that of the other six, had taken upon themselves to ignore (as did the creditor-bank and its attorneys herein) the trustee in bankruptcy and the particular bankruptcy court in charge of the thus fee-burdened particular bankruptcy proceeding.

It, Therefore, Hereby Is Ordered, Adjudged and Decreed that neither American Trust Company, nor its attorneys be allowed any sum whatsoever, to be paid out of the estate of the above-named bankrupt, for opposing the discharge of said bankrupt.

Dated: March 27, 1958.

/s/ BURTON J. WYMAN,
Referee in Bankruptcy.

[Endorsed]: Filed March 27, 1958, Referee.

The specific section of the Bankruptcy Act involved herein is that portion of Section 64 [11 U.SC.A., §104] which reads:

"(a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be ..... (3) where the confirmation of an arrangement or wage-earner plan or the bankrupt's discharge has been refused, revoked, or set aside upon the objection and through the efforts and at the cost and expense of one or more creditors, or, where through

the efforts and at the cost and expense of one or more creditors, evidence shall have been adduced resulting in the conviction of any person of an offense under Chapter 9 of Title 18 of the United States Code, the reasonable costs and expenses of such creditors in obtaining such refusal, revocation, or setting aside, or in adducing such evidence * * *"

REFEREE'S NOTES AND COMMENTS

1. In dealing with a situation such as the one presented herein, a referee in bankruptcy always must bear in mind (a) that "In the administration of the bankruptcy law, it is the policy of the courts to keep the administration expenses to the minimum, and unless this is done, the purpose of the act will be defeated. Economy is strictly enjoined, and this policy should always be adhered to by the courts and the attorneys." In re Kentucky Electric Power Corp. (D.C., Ky.) 11 F. Supp. 528, 531, and (b) that "The statute* defines the groups that may be compensated, but this in no sense is to be construed as meaning shall be compensated * * *. Every case must stand upon its own bottom and is subject to the exercise of a sound judicial discretion by the trial court, subject to review in the event of abuse." In re Herz, Inc. (C.C.A. 7) 81 F. (2d) 511, 513.

2. It strictly has been ruled:

(a) "For administrative reasons Congress has wisely provided that the trustee shall have sole re-

*Section 64 of the Bankruptcy Act [11 USCA, §104].

sponsibility for administering the estate. The courts have therefore held that a creditor may be paid the costs of recovering hidden assets only when he has acted before a trustee is appointed or after the trustee, having been told of the hidden assets, has refused to take action.*" In re Joslyn (C.C.A. 7) 224 F. (2d) 223, 225.

(b) "If any creditor, petitioning or other, learns facts which lead him to suppose that property has been concealed, he may, and indeed he should, advise the receiver, and if the receiver proves slack, he may apply to the referee to stir him to action. The referee or the judge may thus authorize the creditor to proceed, and he will be entitled to his reward under section 64b(2), but not otherwise:*" In re Eureka Upholstering Co., Inc., (C.C.A. 2) 48 F. (2d) 95, 96.

3. If, as it appears from the record In re Eureka Upholstering Co., Inc., supra, the court therein (because of the failure and/or neglect of the allowance-seeking creditors first to have been authorized by the bankruptcy court to act independently of the receiver therein) refused any allowance to such creditors, in spite of the fact that such allowance-seeking creditors, through their own efforts were instrumental in bringing assets in the therein bankruptcy estate, does it not appear herein there was, and is, far greater justification, on the part of the herein referee in bankruptcy for refusing to

*Underlining referee's for emphasis.

make the herein sought-for allowance, wherein, as the record herein shows, the independent, court-unauthorized action on the part of the creditor-bank did not benefit the herein bankrupt's estate in the least?

Seemingly it is not to be overlooked herein, considered from a factual, as well as from the legal aspect of the situation, the aforesaid unauthorized-by-the-court independent action thus taken by the aforesaid creditor-bank, not only brought no benefit whatsoever to the herein bankrupt's estate, but conversely was of benefit to said creditor-bank, inasmuch as said action resulted in the removal of the legal barrier that the bankruptcy proceeding theretofore had raised against said creditor-bank and at the same time paved the way for said creditor-bank to proceed to collect its claim from the bankrupt who no longer is protected by his bankruptcy proceeding.

4. If the District Court, sitting as an appellate court herein shall determine that the herein referee in bankruptcy was justified in making the complained-of order, then it seemingly would appear that whether, or not, a fee of $250.00, or a fee in a greater amount, not to exceed the sum of $750.00, is reasonable need not be answered herein, the same having become moot.

See Southern Pac. Co. v. Eshelman (D.C., N.D., Calif.) 227 F. 928, 932, wherein it is said:

"However convenient or desirable for either party that the questions mooted in the case be authori-

tatively settled for future guidance, the court is not justified in violating fundamental principles of judicial procedure to gratify that desire. To invoke the jurisdiction of a court of justice, it is primarily essential that there be involved a genuine and existing controversy, calling for present adjudication as involving present rights, and although a case may have originally presented such a controversy, if before decision it has, through act of the parties or other cause, lost that essential character, it is the duty of the court, upon the fact appearing, to dismiss it. Mills v. Green, 159 U.S. 651, 653, 16 Sup. Ct. 132, 40 L. Ed 293; Kimball v. Kimball, 174 U.S. 158, 163, 19 Sup. Ct. 639, 43 L. Ed. 932; Jones v. Montague, 194 U.S. 147, 24 Sup. Ct. 611, 48 L. Ed. 913; Lloyd v. Dollison, 194, U.S. 445, 450, 24 Sup. Ct. 703, 48 L. Ed. 1062; Florida v. Georgia, 17 How. 478, 497, 15 L. Ed. 181; Security Life Ins. Co. v. Prewitt, 200 U.S. 446, 26 Sup. Ct. 314; 50 L. Ed. 545; California v. San Pablo, etc. R. R. Co., 149 U.S. 308, 13 Sup. Ct. 876, 37 L. Ed. 747; Tennessee v. Condon, 189 U.S. 64, 23 Sup. Ct. 579, 47 L. Ed. 709; Little v. Bowers, 134 U.S. 547, 10 Sup. Ct. 620, 33 L. Ed. 1016.

"The principles finding expression in these cases have been thus aptly epitomized and stated in 2 Encyc. Sup. Ct. Rep. 289, where, referring to the rule uniformly followed by the Supreme Court, it is said:

" 'It has been the universal practice of this court to dismiss the case whenever it becomes apparent

that there is no real dispute remaining between the plaintiff and the defendant, or that the case has been settled or otherwise disposed of by agreement of the parties, and there is no actual controversy pending. In other words, whenever it appears, or is made to appear, that there is no actual controversy between the litigants, or that, if it once existed, it has ceased, it is the duty of every judicial tribunal not to proceed to the formal determination of the apparent controversy, but to dismiss the case. It is not the office of courts to give opinions on abstract propositions of law, or to decide questions upon which no rights depend, and when no relief can be afforded. Only real controversies and existing right are entitled to invoke the exercise of their powers.' ''

Papers Handed Up Herewith

Handed up herewith, as parts of this certificate and report, are the following:

1. American Trust Company's Proof of Claim Under Sections 62 and 64a(3) of Bankruptcy Act;

2. Trustee's Objections to Priority Claim of American Trust Company;

3. Notice of Hearing of Objections to Claim of American Trust Company;

4. Affidavit of Attorneys for American Trust Company, a Creditor Herein;

5. Stipulated Facts in Connection With Claim

of American Trust Company for Reimbursement Under Section 64a(3) of Bankruptcy Act;

6. Trustee's Opening Brief Relative to Claim of American Trust Company for Reimbursement Under Section 64a(3);

7. American Trust Company's Reply Brief in Support of Claim for Reimbursement Under Section 64a(3) of the Bankruptcy Act;

8. Trustee's Closing Brief;

9. Order, Judgment and Decree Disallowing "Proof of Claim Under Sections 62 and 64a(3) of Bankruptcy Act";

10. Petition for Review;

11. Reporter's Transcript Relative to Objections to Claim of American Trust Company for Fees.

Dated: May 1, 1958.

Respectfully submitted,

/s/ BURTON J. WYMAN,
Referee in Bankruptcy.

[Endorsed]: Filed May 1, 1958, U.S.D.C.

In the United States District Court, Northern District of California, Southern Division

No. 46274

In the Matter of

J. J. KIMBLE,

Bankrupt Debtor.

MEMORANDUM OPINION

Petitioner American Trust Company seeks reimbursement under Section 64A(3) of the Bankruptcy Act (11 U.S.C.A. 104(a) (3)) for its services rendered in blocking the bankrupt's discharge.

Petitioner, through its own attorneys, established to the satisfaction of the Referee in Bankruptcy, that the bankrupt had perpetrated a fraud in connection with certain loans made to him by petitioner. Under these circumstances the bankrupt was not entitled to his discharge and the Referee so held.

In 1938, Section 64A(3) of the Bankruptcy Act was amended to read as follows:

"(a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be * * *

"(3) where the confirmation of an arrangement or wage-earner plan or the bankrupt's discharge has been refused, revoked, or set aside upon the objection and through the efforts and at the cost

and expense of one or more creditors, or, where through the efforts and at the cost and expense of one or more creditors, evidence shall have been adduced resulting in the conviction of any person of an offense under chapter 9 of Title 18, the reasonable costs and expenses of such creditors in obtaining such refusal, revocation, or setting aside, or in adducing such evidence * * *"

Petitioner contends that under the language of this section, the Court is authorized to award costs and attorney fees to it for the role it played in resisting the discharge of bankrupt. Although no case has construed the 1938 amendment under circumstances similar to those before the Court, text writers on the subject have stated views which are in accord with the position taken by petitioner.

> 6 Remington on Bankruptcy (5th Ed.) Section 2725, 3 Collier on Bankruptcy, Sec. 64, 303 (14th Ed.).

A subsidiary point raised in the petition is the amount of the attorney fees to be awarded. Petitioner asks $750 for services consisting of investigation of the bankrupt's financial affairs, preparation of a complaint and an amended complaint in the bankrutcy proceeding, legal research, and appearances before the Referee in Bankruptcy. The trustee himself does not question the reasonableness of the amount requested, although he states that a lesser sum would have been requested by him if he had performed the same services for the creditor. The Referee has stated that he would have

allowed a maximum of $250 to the trustee had he represented the same creditor in opposing the bankrupt's discharge. However, the Referee did not consider the question of reasonableness since he took the view that as a matter of law he was not authorized to award any compensation to petitioner for services performed in connection with the opposition to the discharge.

In denying the requested amount of petitioner, the Referee cited in re Joslyn, 224 F.2d 233, and quoted certain language at page 225:

"For administrative reasons Congress has wisely provided that the trustee shall have sole responsibility for administering the estate. The courts have therefore held that a creditor may be paid the cost of recovering hidden assets only when he has acted before a trustee is appointed or after the trustee having been told of the hidden assets, has refused to take action. In re Otto-Johnson Mercantile Co., 10 Cir., 48 F.2d 741; In re Eureka Upholstering Co., 2 Cir., 48 F.2d 95. The services for which petitioners seek compensation were performed after a trustee had been appointed. *The only action taken by the petitioners in opposition to the trustee was to urge a different means of distributing the estate. This effort by the appellants had nothing to do with bringing the concealed assets into the estate.*" (Italics ours.)

This language demonstrates on its face that the Joslyn case which interprets a different subdivision of the compensation provisions of the Bankruptcy

Act, is readily distinguishable. While it is correct to state that attorneys may only collect fees when specifically authorized by the Bankruptcy Act, petitioner observes that its request is based on express language in the Act, itself. This is correct.

The Referee would require a creditor to present his grievance to the trustee as a prerequisite to employing his own attorney. As in other sections of the Bankrutcy Act it might be desirable to have the trustee expressly refuse to take the requested action before a petitioner-creditor would be entitled to proceed on his own initiative. But the language of 64A(3) does not require that which the Referee believes is desirable. Cf. Gelson v. Rudin, 200 F.2d 31.

The attorney for the trustee would, himself, have been entitled to compensation for performing the identical services. Cf. In re Standard Fuller's Earth Co., 186 F. 578. The only question is one of amount. The Referee may control this. Cf. In re Weissman, 267 F. 588. The bankrupt's estate need not be impaired under the circumstances.

The services performed by petitioner's attorneys were availed of by the trustee. His passive or implied acquiescence in the procedures invoked by petitioner and the consequent acceptance of benefits, create a strong equitable base upon which to predicate the relief prayed for.

Accordingly, It Is Ordered that petitioner be reimbursed for attorney's fees in an amount to be fixed by the Referee in Bankruptcy.

Dated: July 10, 1958.

/s/ GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed July 10, 1958.

[Title of District Court and Cause.]

CERTIFICATE AND REPORT OF REFEREE IN BANKRUPTCY RESPONSIVE TO ORDER OF DISTRICT COURT OF JULY 10, 1958

To Honorable George B. Harris, United States District Judge for the Northern District of California:

Responsive to the following order made by Your Honor on July 10, 1958, "It Is Ordered that petitioner* be reimbursed for attorney's fees in an amount to be fixed by the Referee in Bankruptcy," and in accordance with, and pursuant to, said order of July 10, 1958, and having re-examined the record herein, including the "Proof of Claim Under Sections 62 and 64a(3) of Bankruptcy Act" (filed by American Trust Company), "Trustee's Objections to Priority Claim of American Trust Company," Affidavit for American Trust Company, a

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*The petitioner referred to is American Trust Company which herein petitioned the above-entitled District Court for a review of the referee's order, judgment and decree, dated March 27, 1958.

Creditor Herein," Stipulated Facts in Connection With Claim of American Trust Company for Reimbursement Under Section 64a(3) of Bankruptcy Act," Reporter's Transcript Relative to 'Objections to Claim of American Trust Company for Fees'," and, as the referee who had had charge of, and conducted the proceeding relative to the opposition to the bankrupt's discharge, bearing in mind, and making use of, the judicial knowledge of the character of the services performed and of the professional ability of the attorneys of the bank seeking reimbursement, I, as the referee in bankruptcy primarily in charge of the above-entitled bankruptcy proceeding, and in the light of all the circumstances present herein, hereby fix the sum of $250.00 as reasonable compensation for the said attorneys.

Dated: July 23, 1958.

Respectfully submitted,

/s/ BURTON J. WYMAN,
Referee in Bankruptcy.

[Endorsed]: Filed July 23, 1958, U.S.D.C.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF APPEALS

Notice Is Hereby Given that John O. England, Trustee of the estate of J. J. Kimble, Bankrupt, hereby appeals to the United States Court of Ap-

peals for the Ninth Circuit from the Order of the United States District Court for the Northern District of California, Southern Division, dated July 10, 1958, on Petition for Review of Referee's Order, dated March 27, 1958, reversing said Referee's Order.

Dated: August 5, 1958.

/s/ STANLEY M. McLEOD,
Attorney for John O. England, Trustee of the Estate of J. J. Kimble, Bankrupt.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 7, 1958, U.S.D.C.

[Title of District Court and Cause.]

ORDER DIRECTING PAYMENT OF ATTORNEYS FEE

The Certificate and Report of Referee in Bankruptcy, dated July 23, 1958, Responsive to Order of District Court of July 10, 1958, coming on this 12th day of August, 1958, regularly to be heard, Stanley M. McLeod, appearing as attorney for John O. England, Trustee in Bankruptcy of the above-entitled estate; no appearance on behalf of American Trust Company, petitioning creditor; and

It appearing that this Court heretofore, to wit: On the 10th day of July, 1958, directed that said American Trust Company be reimbursed for at-

torneys' fees in an amount to be fixed by the Referee in Bankruptcy, and said Referee having fixed the sum of $250.00 as reasonable compensation for services rendered in successfully objecting to the granting of a discharge to the bankrupt herein by the attorneys for said American Trust Company, and this Court having considered the matter,

It Is Hereby Ordered, Adjudged and Decreed that there shall be paid to the American Trust Company by the trustee of the above-named estate, the sum of $250.00, as compensation to its attorneys for opposing the discharge of said bankrupt.

Dated: August 20, 1958.

/s/ GEORGE B. HARRIS,
District Judge.

[Endorsed]: Filed August 20, 1958, U.S.D.C.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF APPEALS

Notice Is Hereby Given that John O. England, Trustee of the estate of J. J. Kimble, Bankrupt, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order of the United States District Court for the Northern District of California, Southern Division, dated August 20, 1958, directing said trustee to pay to the American Trust Company the sum of $250.00 as compen-

sation to its attorneys for opposing the discharge of the above-named bankrupt.

Dated: September 18, 1958.

/s/ STANLEY M. McLEOD,
Attorney for John O. England, Trustee of the Estate of J. J. Kimble, Bankrupt.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 18, 1958, U.S.D.C.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein:

Order Directing Payment of Attorney's Fee.

Certificate and Report of Referee in Bankruptcy Responsive to Order of July 10, 1958.

Memorandum Opinion.

Certificate and Report of Referee Relative to Petition of Referee's Order, March 27, 1958.

Trustee's Brief Relative to Claim of American Trust for Reimbursement.

Stipulation of Facts in Connection of American Trust for Reimbursement.

Recorder's Transcript—Objection to Claim of American for Fees.

Trustee's Objections to Priority Claim.

Proof of Claim Under Sections of Bankruptcy Act.

Affidavit of Attorneys for American Trust Company.

American Trust Reply Brief in Support of Claim.

Trustee's Closing Brief.

Petition for Review.

Order Sustaining Specifications of Objections to Bankrupt's Discharge.

Notice of Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said District Court, this 17th day of September, 1958.

[Seal] C. W. CALBREATH,
Clerk;

/s/ WM. J. FLINN,
Deputy Clerk.

[Title of District Court and Cause.]

SUPPLEMENTAL CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of Cali-

fornia, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal as designated:

Notice of Appeal on Order dated August 20, 1958.

Designation of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 23rd day of September, 1958.

[Seal] C. W. CALBREATH,
Clerk;

By /s/ WM. J. FLINN,
Deputy Clerk.

[Endorsed]: No. 16200. United States Court of Appeals for the Ninth Circuit. John O. England, Trustee of the Estate of J. J. Kimble, Bankrupt, Appellant, vs. American Trust Company, Appellee. Transcript of Record. Appeals from the United States District Court for the Northern District of California, Southern Division.

Filed: September 17, 1958.

Docketed: September 29, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 16200

JOHN O. ENGLAND, Trustee of the Estate of J. J. KIMBLE, Bankrupt,

Appellant,

vs.

AMERICAN TRUST COMPANY, a Corporation,

Respondent.

APPELLANT'S STATEMENTS OF POINTS TO BE URGED UPON APPEAL

To: American Trust Company, a corporation, and Brobeck, Phleger & Harrison, Its Attorneys:

You, and Each of You, Will Please Take Notice, under provisions of Rule 75 of the Rules of Civil Procedure for the United States District Court, that the Appellant, John O. England, Trustee of the estate of J. J. Kimble, Bankrupt, intends to rely upon the following points in his appeal to the United States Court of Appeals for the Ninth Circuit, from the Order of the United States District Court for the Northern District of California, dated July 10, 1958, reversing the Order of the Referee in Bankruptcy, and from the Order of the said United States District Court, dated August 20, 1958, directing the payment to said American Trust Company of attorneys' fees:

I.

That the District Court, in its Order of July 10, 1958, erred in reversing the Order of the Referee in Bankruptcy, dated March 27, 1958, disallowing "Proof of Claim Under Sections 62 and 62a(3) of Bankruptcy Act."

II.

That the District Court erred, in its Order of August 20, 1958, in directing the payment to respondent American Trust Company of the sum of $250.00 as attorneys' fees for opposing the discharge of said bankrupt, J. J. Kimble.

Dated this 13th day of October, 1958.

/s/ STANLEY M. McLEOD,
Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 14, 1958.

No. 16,200

United States Court of Appeals

For the Ninth Circuit

JOHN O. ENGLAND, Trustee of the Estate of J. J. Kimble, Bankrupt,
Appellant,

vs.

AMERICAN TRUST COMPANY,
Appellee.

On Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

STANLEY M. McLEOD,
1015 Hearst Building,
San Francisco 3, California,
Attorney for Appellant.

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No. 16,200

United States Court of Appeals
For the Ninth Circuit

JOHN O. ENGLAND, Trustee of the Estate of J. J. Kimble, Bankrupt,
Appellant,

vs.

AMERICAN TRUST COMPANY,
Appellee.

On Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

STATEMENT AS TO JURISDICTION.

J. J. Kimble was adjudged a bankrupt on March 16, 1956, on a petition filed by him on March 15, 1956, and further proceedings were duly referred to the Honorable Burton J. Wyman, Referee in Bankruptcy of the United States District Court for the Northern District of California, Southern Division, at San Francisco in said District.

Appellant John O. England was elected trustee of the bankrupt estate on April 11, 1956. On September 14, 1956, appellee American Trust Company filed its specification of objections to the discharge of the

bankrupt and on October 31, 1956, after a hearing held the same day, the opposition to the bankrupt's discharge was submitted for decision. On August 22, 1957, an order was made denying the bankrupt's discharge based upon said specification (R. 8). On February 21, 1957, appellee filed its proof of claim under Sections 62 and 64-a(3) of the Bankruptcy Act for the sum of $771.50 representing attorneys' fees in the sum of $750.00 and costs in the amount of $71.50 expended by it in preparing and prosecuting its objections to the bankrupt's discharge (R. 3). Appellant trustee on October 30, 1957, filed his objections to said claim (R. 9). A stipulation as to the facts in connection with said claim was thereupon entered into by the parties and approved by the referee (R. 11) and on November 14, 1957, a hearing on said objections was had before the referee (R. 15). On March 27, 1958, the referee made his order disallowing appellee's proof of claim (R. 24-32). Appellee filed its petition to review said order (R. 13-14) which was reversed by the District Court which ordered that appellee be reimbursed for attorneys' fees in an amount to be fixed by the referee in bankruptcy (R. 39-42).

Pursuant to the provisions of 11 U.S.C.A. 47, appellant filed his notice of appeal on August 7, 1958 (R. 44), from said order. Pursuant to the order of the District Court, the referee on July 23, 1958 made his order fixing the sum of $250.00 as reasonable compensation for the attorneys for appellee in opposing the bankrupt's discharge (R. 43-44), and on August 20, 1958, the District Court ordered payment of said

attorneys' fees (R. 45-46). Appellant also filed a timely notice of appeal on September 18, 1958 (R. 46-47), from this order. The jurisdiction of this court to hear the appeals is founded on Section 47 of Title 11 of the United States Code (11 U.S.C.A. Sec. 47).

STATEMENT OF FACTS.

The bankrupt had given a financial statement to the American Trust Company, appellee, for the purpose of securing a loan. After examination in the bankruptcy proceeding, it appeared that such statement was in some respects false. Appellee thereupon caused specification of objections to the bankrupt's discharge to be filed and after hearings thereon, the referee refused to grant a discharge.

Appellee did not, before filing such objections, either request appellant trustee to do so nor did it ask for permission from the referee to file such objections.

In the process of successfully opposing the bankrupt's discharge, appellee incurred attorneys' fees in the sum of $750.00 and costs amounting to $71.50, and filed its proof of claim therefor with the referee in bankruptcy (R. 3-7).

Appellant thereupon filed objections to the allowance of such claim, which objections were sustained by the referee (R. 24-32). After petition for review of said order, the District Court directed the referee to fix reasonable compensation to the attorneys for appellee (R. 39) and eventually $250.00 was ordered paid to appellee (R. 45-46).

QUESTION PRESENTED.

1. Whether the appellee should have first requested the trustee of said bankrupt estate to oppose the bankrupt's discharge, or secured authority from the court to do so itself, and, not having done either, is it entitled to reimbursement from the bankrupt estate of attorneys' fees incurred by it in successfully opposing said bankrupt's discharge?

STATUTES INVOLVED.

Section 47a of the Bankruptcy Act (11 U.S.C.A., Sec. 75a(9)):

> "Trustees shall . . . (9) oppose at the expense of estates the discharges of bankrupts when they deem it advisable to do so. . . ."

Section 64a(3) of the Bankruptcy Act (11 U.S.C.A., Sec. 104):

> "The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be . . .
>
> (3) Where the confirmation of an arrangement or wage-earner plan or the bankrupt's discharge has been refused, revoked or set aside upon the objection and through the efforts and at the cost and expense of one or more creditors, or, where through the efforts and at the cost and expense of one or more creditors, evidence shall have been adduced resulting in the conviction of any person of an offense under Chapter 9 of Title 18 of the United States Code, the reasonable costs and

expenses of such creditors in obtaining such refusal, revocation, or setting aside, or in adducing such evidence."

ARGUMENT.

APPELLEE SHOULD NOT BE ENTITLED TO REIMBURSEMENT FROM THE BANKRUPT ESTATE OF ATTORNEYS' FEES INCURRED BY IT IN SUCCESSFULLY OPPOSING THE BANKRUPT'S DISCHARGE, WHERE IT FAILED TO REQUEST THE TRUSTEE TO TAKE SUCH ACTION, OR TO SECURE AUTHORITY FROM THE COURT TO DO SO ITSELF.

Prior to 1938 a trustee in bankruptcy could oppose a bankrupt's discharge only if thereunto authorized at a special meeting of the creditors. Since 1938 Section 47a of the Bankruptcy Act (11 U.S.C.A., Sec. 75a(9)) lists as one of the duties of the trustee that he shall oppose the discharge of the bankrupt when he deems it advisable to do so. Section 14b (11 U.S.C.A., Section 32(b)) now authorizes opposition by the trustee, creditors, the United States Attorney, or such other attorney as the Attorney General may designate.

In this instance, appellee had in its possession a financial statement of the bankrupt given by him in order to secure credit, and which, after testimony and evidence presented to the court by appellee's attorneys, proved to be false and thus became the basis for objecting to the bankrupt's discharge. The statement was not submitted to the trustee or his attorney, and appellee at no time requested the trustee to perform the duty of opposing the discharge. See statement of stipulated facts (R. 11-13).

If such a request had been made and the trustee had refused to comply, it is conceded that appellee would be free to proceed and eventually be reimbursed from the estate for its expense in successfully opposing this bankrupt's discharge.

But, as is said in *Remington on Bankruptcy,* Fifth Edition, sec. 2268, Volume 6:

> "Where the receiver or trustee is wholly failing to perform his functions and refuses to take steps or initiate proceedings necessary to protect or bring in assets, an attorney for creditors who takes required action successfully may be compensated out of the estate. A creditor's attorney, if he hopes to be paid out of the estate for taking over and performing the trustee's duties, should at least first make a demand on the trustee, and probably should likewise obtain leave of court."

No case has been found construing the 1938 amendment to Sec. 64a(3) of the Bankruptcy Act under circumstances similar to the facts heretofore recited.

The question of the reasonableness of the amount allowed appellee as attorneys' fees is not involved herein. What is, is the fact that if the lower court's decision is upheld, the referee and trustee virtually lose their respective right of administration of a bankrupt estate. Ordinarily, fees are not granted to an attorney, accountant or auctioneer from an estate unless authority for their employment has been given by the court (General Orders in Bankruptcy Nos. 44 and 45). The reason is simple and self-evident, namely, the referee thus retains control of the admin-

istration of an estate and is in a position to limit expenditures or fees payable from the estate.

> "For administrative reasons Congress has wisely provided that the trustee shall have sole responsibility for administering the estate. The courts have therefore held that a creditor may be paid the costs of recovering hidden assets only when he has acted before a trustee is appointed or after the trustee, having been told of the hidden assets, has refused to take action". *In re Joslyn* (C.C.A. 7) 224 F. (2d) 223, 225.
>
> "If any creditor, petitioning or other, learns facts which lead him to suppose that property has been concealed, he may, and indeed he should, advise the receiver to stir him to action. The referee or the judge may thus authorize the creditor to proceed, and he will be entitled to his reward under section 64b(2), but not otherwise." *In re Eureka Upholstering Co. Inc.* (C.C.A. 2) 48 F. (2d) 95, 96.

As the referee said in his certificate (R. 35) the denial of a bankrupt's discharge does not benefit the bankrupt estate:

> "Seemingly, it is not to be overlooked herein, considered from a factual, as well as from the legal aspect of the situation, the aforesaid unauthorized-by-the-court independent action thus taken by the aforesaid creditor-bank, not only brought no benefit whatsoever to the herein bankrupt's estate, but conversely was of benefit to said creditor-bank, inasmuch as said action resulted in the removal of the legal barrier that the bankruptcy proceeding theretofore had raised against said creditor-bank and at the same time paved

> the way for said creditor-bank to proceed to collect its claim from the bankrupt who no longer is protected by his bankruptcy proceeding."

There are seven grounds for opposing a discharge (Sec. 14c (U.S.C.A. Section 32(c)). It could be that seven different creditors could file specifications of objections to the discharge of a bankrupt, each one based upon one of the seven, but different, grounds. The result, if the court were by-passed, would be a multiplicity of objections and hearings with consequent attorneys' fees and costs, all to the eventual and general detriment of creditors generally of the bankrupt estate. It is therefore felt, as the referee stated, that if any allowance is made to appellee under the circumstances heretofore related,

> "a precedent would be established that later, under circumstances the same as those present herein, frequently could, and (inasmuch as said precedent almost certainly would assure, out of bankrupts' estates, the payment of attorneys' fees to attorneys not appointed by the bankruptcy courts to represent anyone officially connected with bankruptcy proceedings involved) in all likelihood, frequently would, be used to justify like 'by-passings' of the bankruptcy courts, and their protective supervision over the administration of bankruptcy estates, and the funds therein involved, thereby weakening, if not making entirely ineffective, the supervision that Congress unquestionably intended should be exercised by bankruptcy courts in administering bankruptcy proceedings. In passing it is to be noted that the supervisory power of a referee in bankruptcy

matters has been referred to by the Circuit Court of Appeals for the Ninth Circuit as 'sweeping.'" *Lines v. Falstaff Brewing Co.,* 233 F. (2d) 927, 931.

CONCLUSION.

The order of the court below dated July 10, 1958, reversing the order of the referee in bankruptcy herein, and its order dated August 20, 1958, directing payment of attorneys' fees to appellee, should be set aside, and the order of the referee in bankruptcy of March 27, 1958, should be affirmed.

Dated, San Francisco, California,
February 6, 1959.

Respectfully submitted,
STANLEY M. MCLEOD,
Attorney for Appellant.

No. 16201

United States
Court of Appeals
for the Ninth Circuit

BANKLINE OIL COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

Petition to Review a Decision of the Tax Court of the United States

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—1-30-59

No. 16201

United States
Court of Appeals
for the Ninth Circuit

BANKLINE OIL COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

Petition to Review a Decision of the Tax Court of the United States

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—1-30-59

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES

MELVIN D. WILSON,
MELVIN H. WILSON, By
MELVIN D. WILSON,
621 S. Hope St.,
Los Angeles, Calif.,

For Petitioner.

CHARLES K. RICE,
Asst. U. S. Attorney General;

LEE A. JACKSON,
Attorney Dept. of Justice,
Dept. of Justice,
Washington 25, D. C.,

For Respondent.

In the Tax Court of the United States

Docket No. 60671

BANKLINE OIL COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1956

Jan. 16—Petition received and filed. Taxpayer notified. Fee paid.

Jan. 17—Copy of petition served on General Counsel.

Mar. 13—Answer filed by Resp. Served 3/21/56.

Mar. 13—Request for Circuit hearing in Los Angeles filed by Resp. Granted 3/21/56. Served 3/21/56.

1957

Sept. 3—Motion by petr. to place case on trial calendar at Los Angeles, the earliest possible date after October, 1957. 9/4/57—Granted. Served 9/5/57.

Oct. 15—Notice of trial Nov. 18, 1957, Los Angeles, Calif.

Nov. 25—Trial had before Judge Withey on merits. Stipulation of Facts and Appearance of Melvin H. Wilson, Esq., filed at hearing. Briefs due Jan. 24, 1958. Replies due Feb. 24, 1958.

Dec. 13—Transcript of hearing Nov. 25, 1957, filed.

1958

Jan. 21—Motion by resp. for extension of time for 30 days to file brief. Granted to 2/24/58. Replies due 3/26/58. Served 1/23/58.

Feb. 24—Brief for Petr. filed.

Feb. 24—Brief for Resp. filed. Served 2/25/58.

Mar. 24—Reply Brief for Petr. filed.

Mar. 26—Reply Brief for Resp. filed. Served 3/27/58.

May 29—Finding of Fact and Opinion filed. Judge Withey. Decision will be entered for the Resp. Served 6/3/58.

June 5—Decision entered, Judge Withey.

Aug. 22—Petition for Review by U.S.C.A. 9th, filed by Petr.

Aug. 22—Proof of Service of petr. for rev. filed by Petr.

Aug. 22—Designation of Contents of Record on Review with proof of service thereon, filed by Petr.

Aug. 27—Designation of Additional Portion of Record on Review with proof of service thereon, filed by Resp.

[Title of Tax Court and Cause.]

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency, AP:LA:AA:RR:AS:LA:AS:COP 90-D,

dated October 25, 1955, and as a basis of its proceeding alleges as follows:

1. The petitioner is a corporation with principal office at 437 South Hill Street, Los Angeles 13, California. The return for the period here involved was filed with the Collector for the Sixth District of California.

2. That Notice of Deficiency (a copy of which is attached and marked Exhibt A) was mailed to the petitioner on October 25, 1955.

3. The deficiencies as determined by the Commissioner are in income tax for the calendar year 1952 in the amount of $14,342.52 plus overpayment claimed of $10,688.30, or a total amount involved of $25,030.82.

4. The determination of tax set forth in the said Notice of Deficiency is based upon the following errors:

A. The respondent erred in failing to treat the $85,000.00 received on the sale of casinghead gas contracts as long term capital gain taxable at a maxiumm rate of 26%.

B. The respondent erred in failing to treat as long term capital gain the further amount of $11,272.40 received in 1952 on the sale of casinghead gas contracts.

C. The respondent erred in failing to find that petitioner overpaid its 1952 income tax by $10,688.30, and that amount is legally refundable.

5. The facts upon which the petitioner relies as a basis of this proceeding are as follows:

A. Petitioner is a corporation organized under the laws of the State of California and has its office at 437 South Hill Street, Los Angeles 13, California.

B. Prior to October 29, 1952, petitioner owned land, buildings and equipment used for a casinghead gasoline plant in the Signal Hill Oil Field in Los Angeles County, California, an interest in State of California oil lease No. 421.1 in the Elwood oilfield, equipment and pipelines thereon; also an undivided interest in two 80,000-barrel storage tanks in said field, together with marine loading equipment used in connection with said tanks.

C. Petitioner also owned certain leases, gas purchase contracts and other purchase agreements entitling it to acquire on a royalty basis or to purchase casinghead gas from various oil operators in Signal Hill Oil Field.

D. In the fall of 1952 the supply of casinghead gas available to petitioner from its said leases and gas purchase contracts and other purchase contracts was insufficient to enable it to operate the said casinghead gas plant at a profit.

E. Signal Oil & Gas Company had other casinghead gas plants and contracts for the purchase of casinghead gas in and around Signal Hill, California.

F. Petitioner sold its property described in paragraph 5-B above to Signal Oil & Gas Company in the fall of 1952 for $50,000.00, which sale is not involved in this controversy.

G. Petitioner also sold to Signal Oil & Gas Company its leases, casinghead gas purchase and other purchase contracts for the sum of $85,000.00, plus further sums of money dependent upon the amount received by Signal Oil & Gas Company from the sale of natural gasoline and LPG products. In the contract of sale of the said gas contracts, etc., it was further provided that the agreement should remain in force and effect for the period of ten years from November 1, 1952, and thereafter so long as Signal shall elect. After ten years from November 1, 1952, should Signal desire not to receive and/or process wet gas produced from the said leases, contracts, etc., Signal should give notice to petitioner to that effect. Within thirty days after receipt of such notice petitioner, by written notice to Signal, could elect to purchase the leases, gas contracts and other purchase agreements for the sum of $10.00 and have such leases and other agreements then remaining in effect reassigned to it. In the event petitioner did not elect to receive such reassignments Signal could sell or assign said agreements to third parties or quitclaim, surrender or otherwise terminate all or any of them.

H. In 1952, under the terms of said contract of October 29, 1952, with Signal, petitioner received

$85,000.00 and $11,272.40 from the sale of said leases, casinghead gas contracts and other purchase contracts.

I. Petitioner had held said leases, casinghead gas contracts and other purchase contracts for more than six months and used the same in the operation of its business and did not hold the said contracts primarily for sale to customers in the ordinary course of its trade or business. Said contracts were depreciable in nature.

J. Petitioner had no cost for said leases, casinghead gas contracts or other purchase contracts and the amount received therefor constituted profits and should be treated as if they were long term capital gains under the provisions of Section 117 (j) of the Internal Revenue Code of 1939 in effect for the year 1952.

K. Petitioner transferred to Signal said contracts for the full useful life thereof. Consequently, it transferred its entire right, title and interest in said contracts or in its equity therein.

L. Petitioner was paying to gas producers a royalty of approximately 40% of the amounts received from natural gasoline and propane gas and dry gas. By October 29, 1952, the going rate of royalty for such products where an existing plant to process the casinghead gas was in operation, was approximately 65%, so that petitioner had a differential of around 25% as compared with current acquisitions of similar contracts.

M. Petitioner was not released from its obligations to the oil producers to pay the 40% royalty but required Signal to pay sufficient amounts to petitioner to enable the petitioner to pay the underlying 40% royalty and to receive an additional amount sufficient to constitute, when added to the $85,000.00, the total value of the approximately 25% differential or equity in said contracts.

N. After the purchase of Signal Hill casinghead gasoline plant and the gas contracts and leases related thereto, Signal dismantled the plant but used the contracts and leases in the operation of its other casinghead gas plants in the same field.

O. Petitioner filed its 1952 income tax returns on March 25, 1953, with the Collector of Internal Revenue, at Los Angeles, California, pursuant to an extension given to file its said return by April 15, 1953.

P. Petitioner paid its 1952 income tax as follows:

On March 25, 1953	$14,097.79
On June 12, 1953	14,097.79
On Sept. 14, 1953	14,097.79
On Dec. 8, 1953	14,097.78
Total	$56,391.00

Q. Petitioner files this petition to the Tax Court of the United States within ninety days of the deficiency letter, dated October 25, 1955.

R. The $56,391.15 income tax paid for 1952 was paid within three years of the date (October 25, 1955) of the mailing of the notice of deficiency.

Wherefore, petitioner prays that this Court may hear the proceeding and determine:

1. That the $85,000.00 petitioner received from the sale of the leases, casinghead gas contracts and other purchase agreements should be taxed as if it were long term capital gain.

2. That the further amount petitioner received from the sale of said leases, contracts, etc., should be taxed as if it were long term capital gain.

3. That petitioner has overpaid its 1952 income tax in the amount of $10,688.30, and that said amount is legally refundable.

Dated this 23rd day of December, 1955.

/s/ MELVIN D. WILSON,

/s/ JOSEPH D. PEELER,

/s/ EUGENE T. GARRETT,
Counsel for Petitioner.

Duly verified.

EXHIBIT A

1250 Subway Terminal Building
417 South Hill Street
Los Angeles 13, California

Copy

Oct. 25, 1955.

Ap:LA:AA-RR
AS-LA:AS-COP
90-D

Bankline Oil Company,
437 South Hill Street,
Los Angeles 13, California.

Gentlemen:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1952, discloses a deficiency of $14,342.52, as shown in the attached statement.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with the Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia in which event that day is not counted as the 90th

day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute, in duplicate, the enclosed form and forward it to the Assistant Regional Commissioner, Appellate, 1250 Subway Terminal Building, 417 South Hill Street, Los Angeles 13, California. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is the earliest.

Very truly yours,

T. COLEMAN ANDREWS,
Commissioner of Internal
Revenue.

/s/ H. L. DUCKER,

By .....
Associate Chief,
Appellate Division.

Enclosures:
Statement
Form 1276
Agreement Form

RBoskosky:BL
5-20-55

Ap:LA:AA-RR
Ap:LA:AS-COP
90-D

STATEMENT

Bankline Oil Company
437 South Hill Street
Los Angeles 13, California

Tax Liability for the Taxable Year Ended
December 31, 1952

Year		Liability	Assessed	Deficiency
1952	Income Tax	$70,733.67	$56,391.15	$14,342.52

In making this determination of your income tax liability careful consideration has been given to the report of examination dated December 3, 1954, your protest dated February 10, 1955, and to the statements made at the conference held on April 18, 1955.

Consideration has also been given to your claim for refund of $21,304.18 income tax and your amended return filed on August 12, 1953. The issues set forth in your claim are allowed in part, however, since a deficiency is disclosed due to other adjustments, your claim will be disallowed.

If a petition to The Tax Court of the United States is filed against the deficiency shown herein, the unallowed issues set forth in your claim for refund should be made a part of the petition to be considered by the Tax Court in any redetermination of your tax liability. If a petition is not filed, the claim for refund will be disallowed and official notice of the disallowance will be issued by registered mail in accordance with section 3772 of the Internal Revenue Code of 1939.

A copy of this letter and a copy of the statement have been mailed to your authorized representative, Mr. Melvin D. Wilson, 621 South Hope Street, Los Angeles 17, California.

Adjustments to Net Income
Year 1952

	Income Tax Net Income	Excess Profits Net Income
Net Income as disclosed on original return	$166,325.79	$ 80,618.61
Unallowable deductions and additional income:		
(a) Ordinary income— gas contracts	$85,000.00	

		Income Tax Net Income	Excess Profits Net Income
(b) Abandonment loss	2,400.00		
(c) Legal expense	1,328.00		
(d) Cost depletion	1,898.80	90,626.80	90,626.80
Totals		$256,952.59	$171,245.41
Additional deductions and reduction:			
(e) Long-term capital gain—gas contracts	$85,000.00		
(f) Intangible drilling costs capitalized	20,000.00		
(g) Rental expense	681.82		
(h) Amortization loss expense	288.20	105,970.02	20,970.02
Net income as adjusted		$150,982.57	$150,275.39

Explanation of Adjustments

(a) and (e) You reported as long-term capital gain the sum of $85,000.00 received during the taxable year from Signal Oil and Gas Company under the terms of an agreement dated November 1, 1952, providing for the processing by that corporation of wet gas from certain properties located in the Signal Oil Field District which are covered by your previous agreements with the producers.

It is held that the sum of $85,000.00 received in the taxable year constitutes ordinary taxable income under the provisions of section 22 of the Internal Revenue Code of 1939 instead of long-term capital gain as reported on your return.

(b) Deduction of $2,400.00 for partial abandonment of oil lease is disallowed, since no loss is recognized until such time as the entire unit is abandoned.

Explanation of Adjustments (Continued)

(c) Deduction of $1,328.00 for legal expenses incurred in connection with reorganization is disallowed as representing an unallowable deduction.
(d) Deduction for depletion is reduced by $1,898.80, due to the adjustment of the cost bases of Ballard leases.

	Cost Basis as Adjusted	Cost Depletion Allowed	Cost Depletion Claimed
Ballard Lease #4	$4,284.26	$1,450.82	$2,863.24
Ballard Lease #26	4,286.92	486.14	972.52
		$1,936.96	$3,835.76
			1,936.96
Adjustment			$1,898.80

(f) In your claim for refund you claim a deduction of $40,000.00 for intangible drilling and development expense in connection with a 50% working interest in four wells on the Ballard lease.

A deduction of $20,000.00 is allowed for drilling costs and the balance is held to represent capital expenditure.

(g) A deduction of $681.82 is allowed for rental expense, as claimed in your claim for refund.

(h) A deduction of $288.20 is allowed for amortization of loan expense, as claimed in your claim for refund.

(i) Net long-term capital gain over net short-term capital loss is computed as follows:

Net long-term capital gain reported	$94,440.84
Decrease—Item (e) above	85,000.00
Net long-term capital gain as adjusted	$ 9,440.84
Less: Capital loss carryover as reported	682.12
Net amount as adjusted	$ 8,758.72

Computation of Tax
Year 1952

Income Tax:

	Alternative Tax	Tax at Ordinary Rates
Net income	$150,982.57	$150,982.57
Less: Excess of net long-term capital gain over net short-term capital loss	8,758.72	
Net income as reduced	$142,223.85	

	Alternative Tax	Tax at Ordinary Rates
Income subject to normal tax and surtax	$142,223.85	$150,982.57
Combined normal tax and surtax:		
52% less $5,500.00	$ 68,456.40	$ 73,010.94
Add: 25% of $8,758.72	2,277.27	
Alternative tax (lesser tax)	$ 70,733.67	
Tax at ordinary rates		$ 73,010.94
Income tax		$ 70,733.67
Excess Profits Tax:		
Excess profits net income		$ 150,275.39
Less: Excess profits credit per return		1,316,128.51
Adjusted excess profits net income		$ 0.00
Excess profits tax		$ 0.00
Income tax liability		$ 70,733.67
Income tax liability per return:		
Original, CI 5 -68, 1953 List, Los Angeles District		56,391.15
Deficiency of income tax		$ 14,342.52

Received and Filed January 16, 1956, T.C.U.S.
Served January 17, 1956.

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, John Potts Barnes, Chief Counsel, Internal Revenue Service, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1, 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the deficiencies as determined by the Commissioner are in income tax for the calendar year 1952, in the amount of $14,342.52. Denies the remaining allegations contained in paragraph 3 of the petition.

4. Denies the allegations of error contained in paragraph 4 of the petition, and all subparagraphs thereof.

5. A. Admits the allegations contained in subparagraph A of paragraph 5 of the petition.

B. Admits that petitioner owned land, buildings and equipment used for a casinghead gasoline plant in the Signal Hill Oil Field in Los Angeles County, California. Denies the remaining allegations contained in subparagraph B of paragraph 5 of the petition.

C-I. Denies the allegations contained in subparagraphs C through I of paragraph 5 of the petition.

J. Admits that petitioner had no cost for said leases, casinghead gas contracts or other purchase contracts and the amount received therefor constituted profits. Denies the remaining allegations contained in subparagraph J of paragraph 5 of the petition.

K. Denies the allegations contained in subparagraph K of paragraph 5 of the petition.

L. Admits that petitioner was paying to gas producers a royalty of approximately 40% of the

amounts received from natural gasoline and propane gas and dry gas. Denies the remaining allegations contained in subparagraph L of paragraph 5 of the petition.

M. Admits that petitioner was not released from its obligations to the oil producers to pay the 40% royalty. Denies the remaining allegations contained in subparagraph M of paragraph 5 of the petition.

N. Denies the allegations contained in subparagraph N of paragraph 5 of the petition.

O. Admits the allegations contained in subparagraph O of paragraph 5 of the petition.

P. Denies the allegations contained in subparagraph P of paragraph 5 of the petition.

Q. Admits the allegations contained in subparagraph Q of paragraph 5 of the petition.

R. Denies the allegations contained in subparagraph R of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation contained in the petition, not hereinbefore expressly admitted, qualified or denied.

Wherefore, it is prayed that this appeal be denied and that the respondent's determination be sustained.

/s/ JOHN POTTS BARNES, R.E.M.
Chief Counsel, Internal Revenue Service.

Filed March 13, 1956, T.C.U.S.

Served March 21, 1956.

[Title of District Court and Cause.]

Filed May 29, 1958.

FINDINGS OF FACT AND OPINION

More than 6 months prior to November 1, 1952, the petitioner entered into certain contracts with eight oil producers. The contracts had no cost or other basis to the petitioner. Under the contracts petitioner was obligated to receive at the well's mouth, meter and transmit through its pipe lines and process casinghead gas produced by the various producers, thereupon deliver to the producers in kind such portions of the resulting products as were required by their respective contracts, sell the remainder of such products, and then compute and pay to the respective producers the portion of the proceeds of sale required by their contracts. The portion of sales proceeds not required to be paid to the producers was retained by petitioner for the work or services it had performed. Prior to November 1, 1952, the petitioner performed all of the work or services required of it under the eight contracts. On November 1, 1952, and effective as of that date, the petitioner entered into an arrangement with Signal Oil and Gas Company which in form was a sale of the eight contracts to Signal but which in total effect or substance was merely an arrangement whereby petitioner employed Signal for at least a period of 10 years and at a fixed or determinable compensation to perform a portion of the work or

services required of petitioner by the contracts. Thereafter, the petitioner continued to perform the initial and final portions of such work or services and Signal has performed the intermediate portion. Held, that the arrangement between petitioner and Signal did not constitute a sale by petitioner of the producers' contracts and that the amounts of $85,000 and $11,351.41 received by petitioner in 1952 under the arrangement were ordinary income to petitioner and not long-term capital gains.

MELVIN D. WILSON, ESQ., and
MELVIN H. WILSON, ESQ.,
For the Petitioner.

MARK TOWNSEND, ESQ.,
For the Respondent.

Withey, Judge:

The respondent determined a deficiency of $14,342.52 in the income tax of the petitioner for 1952. Issues for determination are the correctness of the respondent's action in failing to determine that the amounts of $85,000 and $11,272.40, received by petitioner pursuant to certain transactions involving "casinghead gas" contracts, constituted long-term capital gain and were taxable as such.

Findings of Fact

Some of the facts have been stipulated and are found accordingly.

The petitioner is a California corporation, organized in 1912 and has its principal office in Los Angeles, California. It filed its income tax return for 1952 with the district director in that city. During the years involved herein the petitioner kept its books and filed its income tax returns on an accrual basis.

The petitioner's business consists of the processing of casinghead gas, herinafter sometimes referred to as wet gas, derived from the production of petroleum oils into its separate ingredients, including natural gasoline, dry gas and propane gas, and the operation of a petroleum refinery where natural gasoline is blended with other gasoline and after being refined is purveyed to the public through retail outlets. Its refinery is located at Bakersfield, California. Its processing plants were during 1952 and prior thereto located in Santa Fe Springs, Maricopa and Signal Hill, California. An important determining factor with respect to profitable operation of a casinghead gas processing plant is the availability of an adequate supply of gas so that the plant may be operated at as nearly as possible its full capacity.

More than 6 months prior to November 1, 1952, petitioner had entered into eight separate contracts with oil producers, hereinafter referred to as producers, for the acquisition by it of casinghead gas produced from drilling operations in the Signal Hill Oil Field. The contracts generally each provided

that petitioner was to install and maintain pipelines from producers' wells or gas traps to its Signal Hill processing plant; that it equip the lines with meters so that accurate account might be kept of all gas emanating from the wells of individual producers; that the producer would deliver the wet gas produced at his wells to the pipeline; that petitioner was to process the gas and pay each producer a percentage of the total gross proceeds derived from petitioner's sale or use of the natural gasoline and propane gas extracted by such processing. The producer had an option to receive payment in kind if he so desired. Upon completion of the processing, petitioner had the right to sell to others all of the product not required to be returned to the producer and thereupon to pay the producer, not being paid in kind, a stipulated percentage of the gross sale price received. Petitioner had the right to and did use natural gasoline so derived in its refinery and to pay the producer an equivalent royalty therefor based upon the market price thereof.

The natural gasoline used by petitioner in its refinery under the contracts referred to was not the identical gasoline resulting from its processing operation. Such gasoline was obtained at its Bakersfield refinery from Standard Oil Company of California through an exchange agreement with that concern. By virtue of the exchange agreement petitioner escaped the cost of transporting its natural gasoline from its processing plant at Signal Hill to the refinery.

The Signal Oil and Gas Company, hereinafter referred to as Signal, owned and operated a processing plant for casinghead gas located in the Signal Hill Oil Field. During the fall of 1952 petitioner determined that the operation of its processing plant in Signal Hill was unprofitable or in danger of becoming so because of an inadequate source of supply of gas and for that reason sought a profitable method of divesting itself of its processing plants and equipment. To that end, in the fall of 1952, it began negotiations with Signal for sale to the latter of its processing plant in Signal Hill. On November 1, 1952, the negotiations culminated in the sale by petitioner to Signal of its Signal Hill processing plant, pipelines, pipes, meters, and fittings in the Signal Hill Oil Field (except the pipelines, pipes, meters, and fittings located on the properties from which wet gas was currently being delivered under the above-mentioned eight contracts with oil producers), together with other properties owned by petitioner consisting of oil leases, interest in lands and gasoline storage and pier facilities located in Santa Barbara County, California.

On the same date, a separate agreement was entered into by petitioner and Signal. This agreement was effected by petitioner's acceptance on November 1, 1952, of the following offer of Signal contained in a letter addressed to petitioner and dated October 29, 1952:

Subject to the conditions and for the considerations hereafter set forth, Signal Oil and Gas Com-

pany hereby offers to purchase from you the following properties, to wit:

All leases, gas contracts or other purchase agreements held by Bankline for the purchase or processing of wet gas from properties located in the Signal Hill Oil Field. A schedule of said instruments is hereunto attached and by this reference made a part hereof and marked Exhibit "A."

Signal Oil and Gas Company offers to pay for the above-described properties the sum of $85,000.00, plus further sums of money calculated in the following manner:

Signal shall process said wet gas, or cause said wet gas to be processed, at its plant in the Signal Hill Oil Field or at such other plant or plants as Signal shall hereafter elect, whether or not said plants shall be owned and/or operated by Signal. All dry gas resulting from said operations not required to be returned to the properties from which produced shall be sold by Signal and the net sales price paid to Bankline monthly. All natural gasoline and LPG Propane extracted by Signal from said wet gas shall likewise be sold by Signal at the average price it receives for like products sold by Signal, and Signal shall pay Bankline monthly a sum of money equal to the sales price of said natural gasoline and LPG Propane, less the following sums, to wit:

> The sum of 2½c per gallon on all natural gasoline and the sum of 1¼c per gallon on all LPG Propane.

Said deductions are based upon the present price of 8.33c per gallon posted by Standard Oil Company of California for 21# R.V.P. natural gasoline in the Signal Hill Oil Field and shall be increased or decreased at the times and in direct proportion to any increase or decrease above or below said price of 8.33c per gallon posted by Standard Oil Company of California for 21# R.V.P. natural gasoline in the Signal Hill Oil Field.

Connections shall be established between the wet gas lines presently owned and operated by Bankline and those presently owned and operated by Signal at two locations, to wit: in the proximity of Temple and Hill Streets and in the proximity of Willow and Walnut Streets, Signal Hill, and transmission of said gas shall be made at said points or at other points if in Signal's judgment other connections shall be required. Signal shall also connect its dry gas lines to the dry gas lines presently owned and operated by Bankline in the proximity of Cherry and Willow Streets for delivery of gas to the properties from which it is produced, when such redelivery shall be required. Signal shall meter the wet gas in master meters installed for said purpose and shall make all applicable tests at said points, accounting to Bankline for the entire amount of wet gas received pursuant to this agreement without allocation as to the individual properties from which said gas is produced.

Signal in its operations hereunder shall use the same metering, testing, and accounting procedure

currently used by Signal in connection with other wet gas being purchased by Signal in said Signal Hill field and drips secured from the pipeline system of Bankline will be accounted for on the same basis as other drips collected by Signal; provided, however, that such procedures of metering, testing and accounting shall conform with the provisions of the agreements described in Exhibit "A" as modified from time to time by usages and customs in the industry.

This agreement shall remain in full force and effect for the period of ten years from November 1, 1952, and thereafter so long as Signal shall elect. In the event that at any time after ten years from November 1, 1952, Signal shall desire not to receive and/or process the wet gas produced from the properties described in Exhibit "A" it shall give written notice to that effect to Bankline. Within thirty days after said notice Bankline by written notice to Signal may elect to purchase the leases, gas contracts and other purchase agreements herein purchased from Bankline for the sum of $10.00 and have such of said leases and other agreements then remaining in effect reassigned to it, and upon notice to that effect Signal shall reassign all of said leases and agreements. In the event Bankline shall not elect to receive such reassignments, then Signal may without further obligation to Bankline sell or assign said agreements to third parties or may quitclaim, surrender or otherwise terminate any or all of them.

* * *

The contracts listed in Exhibit A mentioned in the foregoing agreement were the eight contracts with oil producers heretofore mentioned. Pursuant to the foregoing agreement petitioner on November 1, 1952, executed an "Assignment" which recited that petitioner did thereby assign to Signal "all its right, title and interest in, to and under" the eight contracts.

The payment of the $85,000 amount called for by the agreement was by Signal's noninterest-bearing note, dated December 1, 1952, in that amount providing for installment payments of $4,000 monthly over a 20-month period and a final payment of $5,000. Subsequently, the note was paid in accordance with its provisions.

On November 1, 1952, petitioner and Signal orally entered into another agreement which was reduced to writing on December 1, 1952, and was set out as follows in a letter from Signal to petitioner dated December 1, 1952:

Reference is made to our letter to you dated October 29, 1952, wherein Signal Oil and Gas Company offered to purchase from you certain leases, gas contracts and other purchase agreements held by Bankline for the purchase or processing of wet gas from properties located in the Signal Hill Oil Field, which offer was accepted by you under date of the .... day of November, 1952.

Signal Oil and Gas Company hereby agrees to sell and deliver to you natural gasoline in monthly

amounts equivalent to the amount of natural gasoline extracted by Signal from the wet gas processed by it under the provisions of the above-mentioned letter agreement of October 29, 1952. The term of this agreement shall be ten years from November 1, 1952, and so long thereafter as Signal shall be receiving wet gas produced from the above-mentioned wells.

The sales price of all natural gasoline delivered pursuant to this agreement shall be the average price received by Signal during the month in which deliveries are made for natural gasoline of like quality sold by Signal in the Signal Hill Oil Field.

Nothing herein contained shall be construed as requiring us to produce a product of any particular vapor pressure, but delivery shall be made in such product as Signal shall from time to time be producing at the plant in which the above-mentioned wet gas is processed.

* * *

During the negotiations Signal, for accounting and tax purposes, desired that the $135,000 purchase price for petitioner's properties be broken down and allocated in the contracts herein referred to—$85,000 for the casinghead gas contracts, $25,000 for the processing plant and equipment, and $25,000 for other assets of petitioner. So far as either party was concerned, however, the transactions were taken as a whole and consisted of a "package deal." Petitioner was at first indifferent with respect to an allocation,

but later became concerned lest the allocation for the processing contracts be determined to constitute ordinary income. It expressed its concern to Signal and, as a result, that company, by letter also dated December 1, 1952, agreed——

> to indemnify and hold Bankline Oil Company harmless from the payment of any greater United States corporate income tax pursuant to Sections 13, 15 and 430 of the Internal Revenue Code on the receipt of said sum of $85,000.00 than the said income tax calculated on said sales price pursuant to Section 117 of said Code.

On its acquisition of petitioner's Signal Hill processing plant, Signal dismantled it but connected its main pipeline to petitioner's former line and thus conducted the wet gas formerly processed by petitioner to its Signal Hill processing plant. A meter was installed by Signal upon its main pipeline and it thereafter accounted to petitioner for the total gas received by that means.

Subsequent to the above transaction petitioner continued to own and maintain the pipelines to the producers and the meters used in connection therewith and made regular meter readings of the gas received from each producer. The petitioner continued to be liable to the producers for royalties on the gas obtained from them and continued to maintain its own royalty records and to compute and to pay royalties due the individual producers.

Generally, petitioner's operations with Signal were carried on as follows:

All the natural gasoline produced by Signal under the contracts with the oil producers was delivered to Standard Oil Company of California under an exchange agreement for the account of petitioner. At petitioner's direction a portion of this gasoline was delivered by Standard Oil Company to one of the producers to satisfy petitioner's obligation to deliver natural gas as a royalty in kind under the contract between petitioner and that producer. A quantity equal to the balance of the natural gasoline produced was delivered by Standard Oil Company to petitioner at the Bakersfield refinery pursuant to an exchange agreement between Standard Oil Company and petitioner.

Signal billed petitioner for the entire amount of natural gasoline extracted by Signal from the wet gas processed under the contracts with the oil producers, and petitioner paid this amount to Signal. Signal then deducted its charges of 2½ cents per gallon from this amount and returned the remaining amount to the petitioner.

The liquid propane extracted by Signal from the wet gas processed under the contracts with the oil producers was sold to third parties by Signal. The total sales price was received by Signal, a charge of 1¼ cents per gallon was deducted and the remaining amount was paid to petitioner.

The dry gas was handled in the following manner:

A portion of the dry gas was returned to the leases as required by the contracts with the oil producers. Where the dry gas returned to the leases was in excess of the amount required under the contracts, petitioner billed the producers directly and received the proceeds.

A portion of the dry gas was delivered to one of the producers by Signal for the account of petitioner to satisfy petitioner's obligation to deliver dry gas as a royalty in kind under the contract between petitioner and that producer.

The remainder of the dry gas was sold to third parties by Signal and the entire proceeds were remitted to petitioner, as there was no charge for processing dry gas.

Signal, although using less than its total capacity as of the fall of 1952, was operating its Signal Hill processing plant with an adequate supply source of casinghead gas. Its processing of additional gas which it might obtain through petitioner's contracts with producers would be at only a slight increase in its cost of operation. Such gas was unusually rich in that it produced between 8 and 9 gallons of natural gasoline per 1,000 cubic feet of gas. The royalties to producers under petitioner's eight contracts averaged about 42 per cent of the value of natural gasoline and propane gas produced by the processing of wet gas emanating from their wells. In 1952 the

going rate of such royalties to all producers in the Signal Hill area was about 55 per cent. Signal believed the production of casinghead gas from wells in this field would remain relatively constant over a number of years.

During 1952 the usual charge in the Signal Hill Oil Field for processing wet gas varied between $0.0075 and $0.0085 per gallon of natural gasoline resulting therefrom. Ordinarily in 1952 in the Signal Hill area a contract to process wet gas was characterized by an agreement to extract natural gasoline, propane and dry gases therefrom for a fixed price per gallon of gasoline thus produced. All products of the extraction process were returned to the owner of the wet gas or other entity having the right to such products. No title to the wet gas passed to the processor. Such contracts were also characterized by provision for their termination on relatively short notice. To pay a processor a bonus for his services was not customary.

On its books Signal treated the November 1, 1952, transaction relating to the eight producers' contracts as constituting the acquisition of a capital asset and has amortized the amount of $85,000 as the cost thereof. Petitioner, on the other hand, on its books has treated the same transaction and Signal's subsequent disposition of the products produced as sales of those products and the amounts retained by Signal as its charges for processing.

The oral agreement which was reduced to writing on December 1, 1952, relative to the sale by Signal

to the petitioner of natural gasoline equivalent in amount to that obtained through the eight producers' contracts here involved, was canceled by the parties thereto on October 9, 1957, effective as of October 1, 1957.

The petitioner was not engaged in the business of buying and selling casinghead gas contracts. It had no cost or other basis in the eight producers' contracts involved herein.

The following is a statement computed on an accrual basis showing the results of Signal's and petitioner's operations for the months of November and December, 1952, and the years 1953, 1954, and 1955, with respect to the eight producers' contracts involved herein:

	1952	1953	1954	1955
Total value of natural gasoline produced by Signal	$30,557.27	$243,189.78	$231,449.15	$228,378.35
Total amount of propane gas sold third parties by Signal	666.73	5,529.09	5,401.10	4,814.48
Total amount received by Signal from sale of dry gas not consumed by oil and gas producers nor by Signal	1,817.14	13,997.25	13,869.17	16,229.30
Total amount of dry gas delivered by Signal as royalty in kind for account of petitioner	942.66	7,201.64	7,129.82	8,226.81
Total amount of dry gas returned to leases in excess of amounts required by leases	57.57	275.55	229.26	227.47
Total	34,041.37	270,175.31	258,078.50	257,876.41
Portion of sales price of natural gasoline and propane gas retained by Signal	10,235.87	79,196.89	75,026.84	74,772.56
Amounts remitted by Signal to petitioner	23,805.50	190,978.42	183,051.66	183,103.85
Royalties paid by petitioner (plus fair market value of natural gasoline and dry gas delivered in kind)	12,454.09	96,488.68	92,048.81	92,638.42
Net amount remaining after petitioner's payment of royalties to producers	11,351.41	94,489.74	91,002.85	90,465.43

In Schedule D of its income tax return for 1952 the petitioner reported a long-term capital gain of $94,440.84 from the sale of capital assets. In an accompanying schedule in explanation of the gain the petitioner showed the sale of four automobiles, two parcels of real estate and some casing as having been made on August 31, 1952, and prior thereto during 1952. In further explanation the petitioner showed as having been sold on November 1, 1952, the following: "Signal Hill Absorption plant, State Lease PRC 421, and Bishop Tank farm." The gross sale price of the foregoing was shown in a single amount as $135,000. Also shown in single amounts were depreciation, $973,441.76; cost, $1,013,664.67, and gain, $94,777.09. Concededly, nothing was shown in the return to indicate that the eight producers' contracts involved here, or any of them, had been sold or that any portion of the reported gross sales price of $135,000 had been received for or with respect to the producers' contracts.

After making a field investigation of the petitioner's income tax liability for 1952, the respondent determined that $85,000 of the $94,777.09 reported by petitioner as long-term capital gain from the sale of the absorption plant, the state lease and the tank farm constituted ordinary income, giving the following explanation in the notice of deficiency for his action:

You reported as long-term capital gain the sum of $85,000.00 received during the taxable year from Signal Oil and Gas Company under the terms of an

agreement dated November 1, 1952, providing for the processing by that corporation of wet gas from certain properties located in the Signal Oil Field District which are covered by your previous agreements with the producers.

It is held that the sum of $85,000.00 received in the taxable year constitutes ordinary taxable income under the provisions of section 22 of the Internal Revenue Code of 1939 instead of long-term capital gain as reported on your return.

Under the processing arrangement with Signal respecting the eight producers' contracts there accrued to the petitioner during the months of November and December, 1952, total income in the amount of $11,351.41. In its income tax return for 1952, the petitioner reported that income as ordinary income. Like income accruing to the petitioner in subsequent years has been so reported by it in its returns for those years.

Opinion

The petitioner takes the position that by the arrangement it entered into with Signal on November 1, 1952, it sold its entire interest in the eight producers' contracts here involved to Signal, that those contracts were held for use in its business and not primarily for sale to customers in the ordinary course of its business, that the contracts had been held by it for more than 6 months and that accordingly the $85,000 and the $11,351.41[1] received by it

[1]The amount as stated in petition is $11,272.40. The amount shown by stipulation and used by parties on brief is $11,351.41.

pursuant to the arrangement proceeds received from the sale of capital assets held for more than 6 months and were taxable as long-term capital gain under the provisions of section 117 of the 1939 Code.

The respondent takes the position that the arrangement did not constitute a sale by petitioner of the producers' contracts but at most constituted only an arrangement whereby petitioner contracted with Signal that the latter was to perform for a stated minimum period and at a fixed or determinable charge a portion of the services required of petitioner under the producers' contracts and which portion the petitioner theretofore had performed. Accordingly, the respondent contends that neither the $85,000 nor the $11,351.41 represented proceeds from the sale of capital assets but represented amounts received by the petitioner for actually performing and in effecting performance of the services required of it under the producers' contracts and that consequently both amounts were ordinary income.

Respecting section 117 the Supreme Court in Commissioner vs. P. G. Lake, Inc., U.S., decided April 14, 1958, said:

The purpose of § 117 was "to relieve the taxpayer from * * * excessive tax burdens on gains resulting from a conversion of capital investments, and to remove the deterrent effect of those burdens on such conversions." See Burnet vs. Hormel, 287 U.S. 103, 106. And this exception has always been narrowly construed so as to protect the revenue against artful

devices. See Corn Products Refining Co. vs. Commissioner, 350 U.S. 46, 52.

To obtain the benefit of section 117 the taxpayer must bring itself squarely within the terms of the section and all fair doubts are to be resolved against it. Merton E. Farr, 11 T.C. 552, affd. sub. nom. Sloane vs. Commissioner, 188 F.2d 254.

The parties have stipulated that four of the producers' contracts here involved were also involved in Helvering vs. Bankline Oil Company, 303 U.S. 362, which affirmed 33 B.T.A. 910. In that case the petitioner sought deductions for depletion with respect to the gas which it processed during the years 1927, 1928, and 1930 under contracts with producers. In deciding adversely to the petitioner the Supreme Court held that under the contracts the petitioner was not a producer of gas but was "a processor, paying for what it received at the well's mouth," that while "Undoubtedly, respondent [the petitioner] through its contracts obtained an economic advantage from the production of the gas," the contracts granted the petitioner no interest in the gas in place, and that since the petitioner had no capital investment in the mineral deposit which suffered depletion, it was not entitled to the deductions sought. The pertinent portions of the remaining four of the eight producers' contracts involved here are for present purposes substantially the same as those involved in the case decided by the Supreme Court. The parties have stipulated that the petitioner had no cost basis for the eight producers' contracts in-

volved here. Accordingly, we conclude that under the decision of the Supreme Court the petitioner was, as respects all of the eight contracts, "a processor, paying for what it received at the well's mouth," namely, wet or casinghead gas in which it did not have any interest with respect to which depletion deductions were allowable.

Whether, as petitioner contends, it sold its entire interest in the eight producers' contracts to Signal on November 1, 1952, by the arrangement entered into by it and Signal on that date is to be determined from a consideration of the total effect or the substance of the transaction and not its form. Commissioner vs. P. G. Lake, Inc., supra; Conrad N. Hilton, 13 T.C. 623.

Under the producers' contracts the petitioner was obligated to receive at the well's mouth, meter and transmit through pipelines owned and maintained by it and process casinghead gas produced by the various producers and thereupon deliver to the producers in kind such portions of the resulting products as were required by their respective contracts, sell the remainder of such products and then compute and pay to the respective producers the portion of the proceeds of sale required by their contracts. The portion of the sales proceeds not required to be paid to the producers was retained by petitioner for the work or services it had performed. Unquestionably, under the circumstances presented the net income resulting to petitioner from such work or serv-

ices prior to November 1, 1952, constituted ordinary income and not capital gain in its hands. Nor does the petitioner contend otherwise here.

Under the arrangement entered into by petitioner and Signal on November 1, 1952, the petitioner continued to receive the casinghead gas from the producers at the well's mouth, meter it and transmit it through pipelines owned and maintained by it to Signal Hill, California, where petitioner formerly had operated its processing plant. At that point Signal received the gas from the petitioner, processed it, made disposition of the products which resulted from processing, and received the proceeds therefrom. In so doing Signal performed some of the work or services formerly performed by petitioner. After its receipt of the proceeds from the disposition of the products resulting from processing, Signal deducted therefrom 2½ cents per gallon for all natural gasoline and 1¼ cents per gallon for all propane gas resulting from the processing and remitted the remainder to petitioner. Thereupon petitioner began performing work or services formerly performed by it, namely, computing and paying to the producers the portion of such receipts required by their respective contracts. From the foregoing it is clear that on and after November 1, 1952, the petitioner performed part of the work or services required under the producers' contracts and Signal performed part of such work or services, with petitioner performing the initial and final portions and Signal performing the intermediate portion.

It is true that the petitioner executed an "Assignment" which recited that petitioner did thereby assign to Signal all of its right, title and interest in the eight producers' contracts. However, it is also true that under the arrangement of November 1, 1952, if at any time after the expiration of 10 years Signal shall "desire not to receive and/or process" the casinghead gas produced from the properties covered by the producers' contracts, Signal will not be free to dispose of the contracts immediately in any way it sees fit. It first must give petitioner notice of its "desire not to receive and/or process" any further gas covered by the contracts and then petitioner, upon payment to Signal of the token sum of $10, will be entitled to have the contracts "reassigned" to it. In this connection we think it significant that Signal's profits or gains from the contracts are limited solely to the amounts receivable by it under the arrangement of November 1, 1952, with respect to the natural gasoline and propane gas which result from its processing of the casinghead gas.

As shown by our findings, petitioner's and Signal's operations under the arrangement of November 1, 1952, have resulted in the petitioner receiving the greater share of the net profits arising from such operations.

On its books the petitioner has treated as its sales Signal's disposition of the products resulting from the processing of the casinghead gas and treated the amounts retained by Signal as Signal's charges for

processing the gas. The petitioner contends here that such treatment on its books was erroneous and was utilized merely to simplify the manner of accounting for the payments to be made by petitioner to the producers under their contracts. In support of its contention the petitioner relies on the testimony of, among others, Verne Harrell, who at the time of the trial was vice president and treasurer of the petitioner, and who during the fall of 1952 was vice president of the petitioner and in charge of its accounting records. He is and during 1952 was a certified public accountant. His testimony is to the effect that although he did not examine the writings involved in the arrangement entered into by petitioner and Signal on November 1, 1952, he was advised by petitioner's president that petitioner had sold to Signal its Signal Hill processing plant and its gas processing contracts in the Signal Hill field effective November 1, 1952; that the casinghead gas formerly processed in petitioner's Signal Hill plant thereafter would be processed by Signal but that petitioner would continue to be obligated to pay to the producers their royalty share of gasoline and propane; that he thereupon formulated the accounting procedure by which petitioner on its books has treated as its sales Signal's disposition of products and treated the amounts retained by Signal as Signal's charges for processing the gas; and that such procedure was employed to account for the gross proceeds or gross value of the gasoline, propane and dry gas in order to compute the amounts due the producers under their contracts. It is observed that

Harrell's testimony offers no explanation as to why, if the contracts had been sold to Signal as he stated he had been advised, he, as a certified public accountant, found it either necessary or desirable to formulate an accounting procedure indicating the contrary merely in order to compute the amounts due the producers under their respective contracts.

From a consideration of all of the evidence bearing on the character of the transaction of November 1, 1952, between petitioner and Signal, we are of the opinion that the total effect or substance of the transaction was merely an arrangement whereby petitioner employed Signal for at least a period of 10 years and at a fixed or determinable compensation to perform a portion of the work or services required of petitioner by the eight producers' contracts and which portion the petitioner theretofore had performed. But arrangements whereby one is engaged to render services to or for another are not capital assets. General Artists Corporation, 17 T.C. 1517, affd. 205 F.2d 360, certiorari denied 346 U.S. 866; David L. Gordon, 29 T.C. 510; Thurlow E. McFall, 34 B.T.A. 108.

Accordingly, we conclude that the transaction of November 1, 1952, respecting the producers' contracts was not a sale of capital assets as petitioner contends.

The evidence shows that the compensation to Signal provided for in the arrangement of November 1, 1952, was especially favorable to Signal and that

even though Signal paid petitioner $85,000 in accordance with the arrangement, Signal's operations thereunder have been quite profitable to it. As we view the matter, the payment of $85,000 by Signal represented a payment to compensate petitioner in some measure for the lessened sums that would result to it because of the especially favorable compensation provided for Signal under the arrangement. As such, it was ordinary income to the petitioner.

With respect to the $11,351.41, which remained in petitioner's hands after paying from the proceeds received from Signal on account of the November and December, 1952 operations, the amounts due the various producers, we think the following statement from General Artists Corporation, supra, is applicable:

If one person, originally employed to do work, has another do the work, with the consent of the employer, for a part of the charge, the entire amount received is still ordinary income. * * *

Decision will be entered for the respondent.

Served June 3, 1958.

Tax Court of the United States
Washington

Docket No. 60671

BANKLINE OIL COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion filed May 29, 1958, it is

Ordered and Decided: That there is a deficiency in income tax for the taxable year 1952 in the amount of $14,342.52.

[Seal] /s/ G. G. WITHEY,
Judge.

Entered June 5, 1958.

Served June 9, 1958.

In the United States Court of Appeals
for the Ninth Circuit

T. C. Docket No. 60671

BANKLINE OIL COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REVIEW

To: The Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

Bankline Oil Company petitions the United States Court of Appeals for the Ninth Circuit to review the decision entered by the Tax Court of the United States on June 5, 1958, pursuant to its Findings of Fact and Opinion promulgated May 29, 1958 (30 T.C. No. 44) ordering and deciding:

> "That there is a deficiency in income tax for the taxable year 1952 in the amount of $14,342.52."

This petition for review is filed pursuant to the provisions of Sections 7482 and 7483 of the Internal Revenue Code of 1954.

I.

Jurisdiction

Petitioner on review, Bankline Oil Company, hereinafter sometimes called the taxpayer is a cor-

poration organized under the laws of the State of California, and has its principal office and place of business in Los Angeles, California. The taxpayer filed its corporate income tax return for the calendar year 1952 with the Director of Internal Revenue for the Sixth District of California, at Los Angeles, California, which collection district is within the jurisdiction of the United States Court of Appeals for the Ninth Circuit wherein this review is sought. This case involves a deficiency in corporate income tax for the year 1952.

II.

Nature of Controversy

The only issue in this case was whether the $85,000 and $11,351.41 received by petitioner under a contract with the Signal Oil and Gas Company represented proceeds from the sale of capital assets held for more than six months.

More than six months prior to November 1, 1952, petitioner had entered into certain contracts with eight oil producers. The contracts had no cost or other basis to petitioner. Under the contracts, petitioner was entitled to receive at the well's mouths, meter and transmit through its pipelines, and process casinghead gas produced by the various producers, thereupon deliver to the producers in kind such portions of the resulting products as were required by their respective contracts, sell the remainder of said products and then compute and pay to the respective producers the portion of the pro-

ceeds of sale required by their contracts. The portion of sales proceeds not required to be paid to the producers was retained by the petitioner.

By November 1, 1952, the production under the eight contracts had declined to the point where it resulted in an uneconomic operation.

Signal Oil and Gas Company had a casinghead gasoline plant in the same oil field and had a sufficient supply of gas available to it.

As of November 1, 1952, petitioner sold to Signal its casinghead gas plant and its eight casinghead gas contracts mentioned above. Signal demolished the plant and thereafter processed the casinghead gas from the eight contracts in its own plant.

Under the contract of sale petitioner was to receive for the contracts $85,000, plus further sums measured by the sale price of the products which would thereafter be processed and sold by Signal. In 1952, petitioner received the $85,000 and a further sum of $11,351.41 net under said contract of sale.

Petitioner claims that the eight casinghead gas contracts were assets held by it for use in its trade or business and were held for more than six months; that they were sold under a contract pursuant to which petitioner received the $85,000 and $11,351.41 sums in 1952; and that such amounts constitute long term capital gains, or gains to be treated like capital gains under the provisions of Section 117J of the Internal Revenue Code of 1939. Petitioner did not

hold those contracts primarily for sale to customers in the regular course of its business.

The respondent claims that petitioner simply employed Signal to perform part of the work that formerly was performed by petitioner and that petitioner received an advance of $85,000 for giving Signal employment and received the $11,351.41 as ordinary income from its operations, through an agent, as a casinghead gas contractor.

The Tax Court held for the respondent.

III.

Designation of Court of Review

The petitioner being aggrieved by the said opinion, decision and order desires a review thereof in accordance with the provisions of the Internal Revenue Code by the United States Court of Appeals for the Ninth Circuit, within which circuit is located the office of the Director of Internal Revenue with whom said petitioner filed its 1952 income tax return.

IV.

Statement of Points

Now comes Bankline Oil Company, petitioner on review in the above-entitled cause, and states that it intends to rely upon the following points in this proceeding:

That the Tax Court of the United States erred:

1. In failing to find and hold that the $85,000 and the $11,351.44 received by petitioner during the

calendar year 1952 from Signal were items of income subject to treatment as long term capital gains.

2. In failing to find and hold that the casinghead gas contracts held by petitioner prior to November 1, 1952, were assets held for more than six months for use and not primarily for sale to customers in the ordinary course of its trade or business.

3. In failing to find and hold that said contracts constituted valuable property in the hands of petitioner in that they entitled petitioner to the exclusive output of wet gas from the producing wells, so long as petitioner or its successors and assigns complied with the covenants of the contracts.

4. In finding and holding that petitioner's right under the contracts to receive all of the wet gas produced from the wells did not constitute valuable property rights and assets used in the ordinary course of its trade or business because petitioner had no depletable interest in the oil and gas in place.

5. In holding that under the contracts petitioner was merely obligated to perform nondelegable personal services for the producers and could not validly assign such obligation because it was too "personal" in nature.

6. In failing to find and hold that under the casinghead gas contracts petitioner had the right to the exclusive output of all of the wet gas produced and acquired title thereto at the instant the wet gas passed into its gathering lines and that petitioner thereby had an absolute duty to pay for the wet gas,

a price measured by the quantities of natural gasoline produced in its processing plant and sold.

7. In failing to find and hold that the nature of wet gas processing is such that any processor can satisfactorily perform the work and therefore such work is not too "personal" to be delegated.

8. In finding and holding that petitioner did not sell to Signal substantially all of its right, title and interest in the casinghead gas contracts.

9. In holding that Signal was simply working for petitioner in relation to the casinghead gasoline plant in Signal Hill Oil Field, California.

10. In holding that the amounts which Signal received from petitioner from the sale of casinghead gasoline products to petitioner were in part returned to petitioner and that Signal, excepting a processing charge, received such amounts as agent for petitioner.

11. In holding that petitioner continued to own the eight casinghead gas contracts and perform directly or through Signal the services required by petitioner under such contracts and receive ordinary income therefrom.

12. In holding that petitioner continued to receive the casinghead gas from the producers at the well's mouths after November 1, 1952, for its own account, instead of for the account of Signal, the assignee of such contracts.

13. In holding that Signal, until after ten years from November 1, 1952, was not free to sell the casinghead gas contracts acquired from petitioner (provided the assignee continued to perform the covenants contained in said casinghead gas contracts).

14. In failing to find that Signal, as principal, until the fall of 1957, sold the finished casinghead gasoline back to petitioner and received payment in full therefor.

15. In holding that there was little change in petitioner's operations or economic position after the transaction with Signal, while at the same time admitting that the transaction was undoubtedly financially advantageous to both of the parties.

16. In failing to hold that petitioner greatly changed its operations and economic position as a result of its contracts with Signal.

17. In failing to hold that petitioner's casinghead gas contracts were worth more to Signal than they were to petitioner and petitioner could get more by selling the contracts to Signal than it could by keeping and operating them.

18. In finding that petitioner had a tax avoidance motive in adopting the form of the contracts with Signal, and that the substance of such contracts differed from the form thereof.

20. In finding and holding that the 2½c per gallon retained by Signal was a processing charge when the usual processing charge was .75c. The

differential worked out to be about $40,000 per year or about $400,000 over ten years.

21. In holding that petitioner was willing to pay an aggregate of $400,000 over a ten-year minimum period solely for the purpose of receiving capital gain treatment on the $85,000 it received from Signal allegedly as a bonus for employing Signal.

22. In ordering and deciding that there was a deficiency in petitioner's 1952 Federal corporate income tax liability of $14,343.52.

23. In failing to order and decide that petitioner has overpaid its 1952 income tax liability by $10,688.30 and that said amount is legally refundable.

24. In failing to find that petitioner's bookkeeping entries with respect to the transactions covered by this case were dictated by the requirement that petitioner's books show the basis of the royalties payable to the producers of casinghead gas.

Wherefore, petitioner prays that the errors committed by the Tax Court be corrected and that the judgment and findings of the Tax Court be modified.

Dated: August 19, 1958.

MELVIN H. WILSON,
MELVIN D. WILSON,

By /s/ MELVIN D. WILSON,
Attorneys for Petitioner.

State of California,
County of Los Angeles—ss.

I, Melvin D. Wilson, state that I am the Petitioner's attorney of record in the above-entitled matter and am thoroughly familiar with the facts involved in said matter; that I have read the above Petition for Review; that it closely states the facts, matters and controversy and the history of the case, to the best of my knowledge and belief.

/s/ MELVIN D. WILSON.

Subscribed and sworn to before me this 19th day of August, 1958.

[Seal] /s/ ESSIE McCORMICK,
Notary Public in and for said County and State.

Received and filed August 22, 1958, T.C.U.S.

[Title of Court of Appeals and Cause.]

NOTICE OF FILING PETITION TO REVIEW DECISION OF THE TAX COURT OF THE UNITED STATES

To: Commissioner of Internal Revenue, Internal Revenue Building, Washington, D. C., and Arch M. Cantrall, Chief Counsel, Internal Revenue Service, Washington, D. C., Attorney for Respondent.

You are hereby notified that on the 22nd day of August, 1958, a Petition to Review Decision of the

Tax Court of the United States heretofore rendered in the above-entitled cause was filed with the Clerk of the Tax Court of the United States. A copy of the petition as filed is attached hereto and served upon you.

Dated: August 19, 1958.

MELVIN D. WILSON,
MELVIN H. WILSON,

By /s/ MELVIN D. WILSON,
Attorneys for Petitioner.

Receipt of copy acknowledged.

Received and filed August 22, 1958, T.C.U.S.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated that, for the purpose of this case, the following statements may be accepted as facts and all exhibits referred to herein and attached hereto are incorporated in this stipulation and made a part thereof; provided, however, that either party may introduce other and further evidence not inconsistent with the facts herein stipulated.

1. Petitioner is a corporation with principal offices at 437 South Hill Street, Los Angeles 13, California. The return for 1952 was filed with the District Director of Internal Revenue at Los Angeles, California. Petitioner's books were kept and

its returns filed on the accrual basis for the years involved.

2. Petitioner, as of November 1, 1952, owned a casinghead gas plant and pipelines, located in the Signal Hill Oil Field, California. It also owned an oil and gas lease and other property located in the Elwood Oil Field, Santa Barbara County, California. On November 1, 1952, petitioner entered into an agreement with Signal Oil and Gas Company, a Delaware Corporation operating in California, for the sale of all of the property described in this paragraph for the total sum of $50,000. Attached hereto as Exhibit 1 is a letter of agreement dated October 29, 1952, accepted November 1, 1952, between petitioner and Signal Oil and Gas Company relating to said sale.

3. Prior to November 1, 1952, petitioner had entered into contracts for the acquisition of wet or casinghead gas, or liquid petroleum gas from oil producers from their leases on land located in Signal Hill Oil Field, California. Petitioner was engaged in the business of treating wet or casinghead gas by the extraction of gasoline therefrom. Copies of said contracts are attached hereto and marked Exhibits 2—a to h, inclusive. Certain of said contracts (specifically c, d, g and h of Ex. 2) have been considered by the United States Supreme Court in Helvering vs. Bankline Oil Co. (1938) 303 U.S. 362, 20 A.F.T.R. 782.

4. Attached hereto and made a part hereof and marked Exhibit 3, is a copy of a letter agreement

dated October 29, 1952, and accepted November 1, 1952, between petitioner and Signal Oil and Gas Company relating to said Exhibit 2 contracts.

5. Attached hereto and marked Exhibit 4 is a copy of an installment note dated December, 1952, in the face amount of $85,000.00, executed by Signal Oil and Gas Company in favor of petitioner, being part of the amount set forth in Exhibit 3.

6. Attached hereto and marked Exhibit 5 is a copy of a letter of indemnity dated December 1, 1952, addressed to petitioner by Signal Oil and Gas Company.

7. Petitioner was engaged in the business of processing casinghead gas under the terms of the casinghead contracts and was not engaged in selling said gas contracts. Petitioner entered into the casinghead gas contracts (Ex. 2—a to h) more than six months prior to October 28, 1952.

8. Petitioner had no cost basis for the casinghead gas contracts concerning which it contracted with Signal Oil and Gas Company on November 1, 1952.

9. Signal Oil and Gas Company had other casinghead gas plants and contracts for the purchase of casinghead gas in and around Signal Hill Oil Field, California.

10. In 1952, under the terms of the said contract (Ex. 3) petitioners received $85,000 and $11,351.41 from Signal Oil and Gas Company, computed on the accrual basis, plus further sums in an amount suf-

ficient to enable petitioner to pay the royalties required by the contracts herein called Exhibit 2—a to h.

11. Petitioner continued to pay the oil producers the amounts due them under the contracts referred to herein as Exhibit 2—a to h, inclusive, as petitioner received monies from Signal Oil and Gas Company under its contract (Ex. 3).

12. After the purchase by Signal Oil and Gas Company of the casinghead gas plant from petitioner in Signal Hill Oil Field, the Signal Oil and Gas Company dismantled the plant but continued to operate another casinghead gas plant in that field and took in and processed casinghead gas under the contracts referred to in Exhibit 2—a to h, inclusive.

13. Petitioner filed its 1952 income tax return on April 15, 1953, with the District Director of Internal Revenue, Los Angeles, California, pursuant to an extension given to file its said return by April 15, 1953. Attached hereto and marked Exhibit 6 is a copy of such return.

14. Petitioner paid its 1952 federal income taxes as follows:

March 25, 1953	$25,000.00
June 12, 1953	20,112.92
September 14, 1953	5,639.12
December 8, 1953	5,639.11
Total	$56,391.15

15. Petitioner filed its petition to the Tax Court of the United States within ninety days of the deficiency letter dated October 25, 1955.

16. The $56,391.15 income tax paid for 1952 was paid within three years from the date of the mailing of the notice of deficiency.

17. Petitioner does not contest the adjustments to income for 1952 as set forth in the notice of deficiency excepting as to the treatment of $85,000 and the $11,351.41 received by petitioner from Signal Oil and Gas Company under the contracts as set forth in this stipulation.

18. Attached hereto and marked Exhibit 7 is a copy of the contract between Signal Oil and Gas Company and petitioner, dated December 1, 1952, which reduces to writing the same oral agreement made on November 1, 1952.

19. The following is a statement showing the results of the operations under the contract called herein Exhibit "3" by years, computed on the accrual basis (Signal Oil and Gas Company is referred to in such statement as "Signal"):

	1952	1953	1954	1955
(a) Total value of natural gasoline produced by Signal under Exhibits 2 and 3. Petitioner is billed for this amount by Signal and remits this amount to Signal.*	$30,557.27	$243,189.78	$231,449.15	$228,378.35
(b) Total amount of LPG Propane sold to third parties by Signal. Total sales price is received by Signal and Signal remits to petitioner the amount due petitioner under contract called Exhibit 3. The total amount of the LPG Propane produced by Signal is treated as sales on petitioner's books.	666.73	5,529.09	5,401.10	4,814.48
(c) Amount received by Signal from the sale of dry gas not consumed by the oil and gas producers or by Signal. This entire amount is turned over to petitioner under contract (Ex. 3) and treated as sales on petitioner's books.	1,817.14	13,997.25	13,869.17	16,229.30
(d) Amount of dry gas delivered to General Petroleum Corp. (as a royalty in kind under contract called Ex 2e) by Signal for the account of petitioner. No entry is made on petitioner's books concerning this item.	942.66	7,201.64	7,129.82	8,226.81
(e) Amount of dry gas returned to leases which is in excess of amounts required to be returned to leases. This amount is billed to producers by petitioner and treated as sales on petitioner's books.	57.57	257.55	229.26	227.47
	34,041.37	270,175.31	258,078.50	257,876.41
(f) Portion of sales price of natural gasoline and LPG Propane retained by Signal under contract called	10,235.87	79,196.89	75,026.84	74,772.56

Exhibit 3. (Signal retains no part of the amount received from the sale of dry gas.)				
(g) Amounts remitted by Signal to petitioner (plus the fair market value of dry gas delivered to General Petroleum Corp.) under the contract called Exhibit 3.	23,805.50	190,978.42	183,051.66	183,103.85
(h) Royalties paid by petitioner (plus the fair market value of natural gasoline and dry gas delivered in kind to General Petroleum Corp.) as required by contracts called Ex. 2a to h. Petitioner enters royalties paid plus the fair market value of natural gasoline delivered in kind as royalty expenses in its books but makes no book entries concerning dry gas delivered in kind.	12,454.09	96,488.68	92,048.81	92,638.42
(i) Net amounts remaining after payment of royalties.	11,351.41	94,489.74	91,002.85	90,465.43

* Petitioner has all this natural gasoline delivered to the Standard Oil Company at the Signal Hill Oil Field for the account of petitioner. A portion of said gasoline is delivered by Standard Oil Company to General Petroleum Corp. at petitioner's direction to satisfy petitioner's obligation to General Petroleum Company to deliver natural gas royalty in kind under contract (Ex. 2e). A quantity equal to the balance (being the major portion) is delivered by Standard Oil Company to petitioner at petitioner's Bakersfield refinery pursuant to an exchange agreement between Standard Oil Company and the petitioner. The total amount of the gasoline produced by Signal is treated as sales on petitioner's books.

20. The Signal Oil and Gas Company on its books has treated the $85,000 payment to petitioner as a capital expenditure and has been amortizing this amount on a unit basis based on estimated casinghead gas reserves.

21. Attached hereto and marked Exhibit 8—a to f, inclusive, are copies of accounting records maintained by petitioner, by Signal Oil and Gas Company, and by Standard Oil Company for the month of December, 1954, recording the operations under the contract called herein Exhibit "3." These records are typical examples of the accounting procedures followed during 1952 and later years. Exhibit 8 is more specifically identified as follows:

8a—Journal voucher of Bankline Oil Company.
b—Wet Gas Royalty Statement of Signal Oil and Gas Company.
c—Invoice of Signal Oil and Gas Company.
d—Payment statement of Bankline Oil Company.
e—Oil settlement statement of Standard Oil Company.
f—Payment statement of Standard Oil Company.

22. Attached hereto and marked Exhibit 9 is a copy of certain resolutions adopted by petitioner in connection with the above-described transactions with Signal Oil and Gas Company.

23. Attached hereto and marked Exhibit 10 is a copy of an assignment executed by petitioner on

November 1, 1952, relating to the contracts called herein Exhibit 2.

/s/ MELVIN D. WILSON,
Counsel for Petitioner.

/s/ NELSON P. ROSE, ECC.
Chief Counsel, Internal Revenue Service, Counsel for Respondent.

EXHIBIT No. 1

(Copy)

Signal Oil and Gas Company
General Offices 811 West Seventh Street
Los Angeles 17, California

October 29, 1952.

Bankline Oil Company,
437 South Hill Street,
Los Angeles, California.

Gentlemen:

Subject to the conditions and for the considerations hereafter set forth, Signal Oil and Gas Company hereby offers to purchase from you the following properties:

(1) The lessee's interest under that certain agreement dated October 22, 1949, entitled "Oil and Gas Lease Extension and Renewal" between the State of California and Bankline Oil Company, which said extension and renewal superseded State

Oil and Gas Lease No. 89 issued by the State of California under date of October 22, 1929, together with all of your right, title, interest and estate in and to the lands covered thereby, and the wells located thereon, subject to the interests of G. C. Fitzgerald and Bernice T. Fitzgerald, his wife, and their assignees under the agreement between said Fitzgeralds and H. J. Barneson entered into under date of the 28th day of January, 1929, and subject also to assignments of a total of 12½% interest in the profits from operations under said lease by Bankline Oil Company to C. M. Weatherwax, H. C. Hunt and A. M. Kaime under agreement dated September 17, 1929.

(2) The lessee's interest under that certain lease and agreement made and entered into under date of the 2nd day of August, 1929, by and between Thomas B. Bishop Company, a corporation, as lessor, and Bankline Oil Company, as lessee, the demised premises being described in said agreement, and also all of Bankline's interest under two other agreements between the same companies dated August 1, 1930, and December 23, 1948.

(3) All of Bankline's right, title and interest in and to all leases, easements, right of ways or other rights for oil and gas lines, water lines, power lines, or other utilities or facilities connecting with or used in the operations on the lands covered by said oil and gas lease extension and renewal dated October 22, 1949, or said Bishop lease, together with all pipe, pipelines, tanks, equipment, material, sup-

plies, houses and other personal property located upon the lands covered by any of said leases, easements and right of ways or used in connection therewith, together with all easements, right of ways or other rights relating to ingress and egress to and from said leases.

(4) That certain real property located on Willow Street in the City of Signal Hill, County of Los Angeles, State of California, on which Bankline's gas plant is located, together with the building and plant facilities located thereon and all machinery, equipment, tools, pipelines or other personal property located on said real property or used in connection therewith.

(5) All pipelines, pipes, meters and fittings owned by Bankline in the Signal Hill Oil Field and used for the collection and transmission of wet gas to Bankline's plant or the return of dry gas, together with all franchises, easements, rights or right of ways for the installation, maintenance and use of said pipelines and pipes, excepting therefrom that portion of such pipelines, pipes, meters and fittings actually located upon the properties from which such wet gas is being delivered.

Signal Oil and Gas Company offers to pay the sum of $25,000 for the properties described in paragraphs (1) to (3), inclusive, and offers to pay the sum of $25,000 for the properties described in paragraphs (4) and (5). Payment shall be made upon delivery of instruments of conveyance or assign-

ment, or at close of escrow in the event an escrow is opened to handle this transaction.

Said offer is made upon the following additional terms and conditions:

(a) That the State of California consents to the assignment of said Oil and Gas Lease Extension and Renewal dated October 22, 1949, from Bankline to Signal.

(b) That the Thomas B. Bishop Company consents to the assignment by Bankline to Signal of all of Bankline's rights under said lease and agreement dated August 2, 1929, and said supplemental agreements dated August 1, 1930, and December 23, 1948.

(c) That the consent of any other party whose consent may be required to permit the assignment by Bankline to Signal of all of Bankline's interest under any agreement described or otherwise referred to herein is obtained.

(d) That the State of California gives satisfactory assurance to Signal that it is now recognizing that the cost of storing and loading oil through the sea loading facilities being transferred hereunder from Bankline to Signal is 5c per barrel and that Signal may account for and pay royalties to the State of California on oil produced by it in the Elwood Field at a price that is 5c per barrel less than the price received by Signal for said oil loaded aboard ship, and that the fair market value at the wellhead of oil produced in the Elwood field at the

present time is 5c per barrel less than the value of said oil loaded aboard ship.

(e) That the Thomas B. Bishop Company agrees to extend the term of said lease and agreement dated August 2, 1929, beyond the term now specified therein and to extend said lease for a term expiring when Signal discontinues the production of oil in the Elwood oil field.

(f) That the properties hereinabove described are free and clear of all liens and encumbrances other than taxes for the years 1952-1953, and easements and right of ways, conditions and restrictions of record.

Both parties agree to use their best efforts to obtain all of the consents and agreements set forth in Paragraphs (a) to (e) of this letter agreement, and further agree to hereafter execute and deliver any and all other papers or documents necessary to fully carry into effect the intents and purposes of this agreement.

In the event that said sales are consummated, Signal shall assume and agrees to perform all of the lessee's obligations under said Oil and Gas Lease Extension and Renewal dated October 22, 1949, and all of Bankline's obligations as assignee of H. J. Barneson under the agreement between G. C. Fitzgerald and Bernice T. Fitzgerald and H. J. Barneson dated January 28, 1929, and all of Bankline's obligations under its agreement with C. M. Weatherwax, H. C. Hunt and A. M. Kaime dated Septem-

ber 17, 1929, and all of Bankline's obligations under all other leases, easements or agreements for right of ways accruing after the effective date of this transaction.

Concurrently with the confirmation of said sales, Bankline agrees to transfer to Signal all of Bankline's right, title and interest in and to funds now being held by the Farmers and Merchants Bank of Los Angeles under escrow No. 16473-SH for the joint account of Bankline, and G. C. Fitzgerald and Bernice T. Fitzgerald, and their successors and assigns under said agreement dated January 28, 1929, and Bankline agrees to transfer to Signal all moneys accumulated and impounded by Bankline under the provisions of said agreement dated September 17, 1929, between Bankline and C. M. Weatherwax, H. C. Hunt and A. M. Kaime.

Signal agrees to protect, defend and indemnify Bankline and to hold it harmless from and against any claims which may be made or asserted against Bankline by any person claiming to be entitled to the foregoing sums hereinabove transferred from Bankline to Signal, or to either of them, or to any portion of said funds or either of them.

All taxes levied or assessed against any of said properties or the mineral rights from the years 1952-1953 shall be prorated to November 1, 1952.

It is contemplated that Signal shall take possession of all of the above-described properties on November 1, 1952, and thereafter operate the wells

and other facilities. As of the date Signal takes possession the parties shall gauge the tanks on the Bishop property and proper adjustment shall be made between the parties for all oil, gas and other hydrocarbons produced up to that date. Bankline shall account for and pay all rentals, royalties and other charges accruing up to and including the 31st day of October, 1952, and Signal shall pay all rentals, royalties and other charges accruing thereafter.

In the event for any reason the sale should be consummated, then Signal shall redeliver possession of said properties to Bankline and account for all moneys received by it, less expenses of operation.

If the foregoing is acceptable to you, will you please so indicate by signing and returning the carbon copy of this letter.

Yours very truly,

SIGNAL OIL AND GAS COMPANY,

By /s/ R. H. GREEN,
Vice President.

So Understood and Agreed This 1st day of November, 1952.

BANKLINE OIL COMPANY,

By /s/ L. L. AUBERT.

EXHIBIT No. 2-A

Agreement

This Agreement, made and entered into this 15th day of June, 1936, by and between Bankline Oil Company, a California corporation, hereinafter designated as "Operator," and Jet Oil Company, a California corporation, hereinafter designated as "Producer,"

Witnesseth:

Whereas, Producer is the lessee of those certain parcels of land situated in the Signal Hill oil field, Los Angeles County, California, described as follows, to wit:

> Block Four (4), Signal Hill Tract, City of Signal Hill, County of Los Angeles, as per map recorded in Book 9 at pages 2 and 3 in the office of the County Recorder of said County;

and,

Whereas, Producer is the lessee of the above-described premises and is the owner of the natural gas produced therefrom and hereby guarantees its right and title to same, subject to the terms of its lease; and

Whereas, Operator has erected and is operating a plant or plants in the Signal Hill oil field for the purpose of treating gas for the extraction of gasoline therefrom; and,

Whereas, Operator in order to augment its supply of gas for said plant or plants, desires to purchase and/or receive from Producer all of the producer's gas which may be produced by Producer from the property above described, and Producer is willing and desires to sell and/or deliver to operator all of the gas produced by Producer from the above-described property, and hereby guarantees its right and title to same;

Now, Therefore, in consideration of the premises and of the covenants, agreements and payments hereinafter set forth and other valuable considerations, the receipt of which is hereby acknowledged, the parties hereto covenant and agree with each other as follows:

1. Producer hereby agrees to furnish and deliver to Operator and Operator agrees to take and utilize in its plant or plants, subject to the terms and conditions of this agreement, all of producer's natural gas produced from the above-described property during the life of this agreement, except as provided in paragraphs 7, 8 and 9 hereof.

2. All gasoline condensed in the lines, pumps or traps of said Producer shall be considered as a part of the gas to be delivered to Operator and shall be accounted for by Operator as gasoline extracted from said gas.

3. Operator is granted the exclusive right to treat gas produced from the above-described property for and during the period of this agreement.

4. Producer shall deliver the gas at the casingheads and/or at gas traps installed by Producer on the premises above described. Producer agrees to use its best efforts to prevent the inleakage of air in traps or lines. Operator shall furnish, install and maintain all pipelines and connections from casingheads or traps to its plant or plants and such meters as may be necessary for the accurate measurement of the gas received from the property.

5. Producer, insofar as it has the right to do so, shall furnish right of ways for such pipelines and connections on the property. Producer hereby grants to Operator a right of way for its employees and vehicles over and across the lands of Producer hereinabove described for any and all purposes necessary or proper in connection with the business of Operator insofar as it pertains to the functions to be performed by Operator under the terms of this agreement. Operator shall be entitled to remove, within a reasonable time after the termination of this agreement, all pipelines, connections, meters and other equipment installed by it.

6. Operator agrees to pay to Producer as royalty forty per cent (40%) of the proceeds derived from the sale of gasoline extracted from said gas, or, at Producer's option as hereinafter provided, to deliver to Producer as royalty forty per cent (40%) of the gasoline extracted from said gas.

Producer shall have the right to take its royalty gasoline in kind if it so desires, provided that it

shall in such event serve Operator with thirty (30) days' advance notice in writing of such intention. An option once exercised to take such royalty either in cash or in kind shall not be changed for at least six (6) months unless agreed to by both parties hereto.

In event royalty gasoline shall be paid in kind, Operator shall provide ten (10) days' free storage of the royalty gasoline belonging to Producer in tanks provided by Operator; provided, however, that such storage shall be at Producer's risk as to all loss by evaporation, fire and/or other causes beyond the reasonable control of Operator.

In event Producer fails to remove said royalty gasoline from the tanks of Operator within the said ten-day period, Operator shall not be obligated to deliver said royalty gasoline to Producer except at such times and in such quantities as will not interfere with the sales and/or deliveries of gasoline which Operator is otherwise required to make from said plant.

Royalty payments shall be made by Operator to Producer on or before the 20th day of each calendar month next succeeding that in which the gasoline is produced.

7. It is understood that Producer is operating its property primarily for oil production, and Operator agrees to handle the gas produced from Producer's property at pressures which in the opinion of Producer will not interfere with the production

of oil from the leases. It is understood and agreed by and between the parties hereto that during the period of flush production, or in event Producer insists on maintaining extremely low pressures on casingheads or gas traps, Operator shall not be obligated to take, treat or pay for gas produced and/or vented during such periods.

In event that the amount of gas produced from the properties of Producer, together with the amount of gas produced from properties of other producers with whom Operator has contracts for the treatment of gas, exceeds the capacity of the plant of Operator, and said excess quantity is not sufficiently permanent in the judgment of Operator to justify the construction of additional plant capacity, then during the period of said excess production the amount of gas of Producer treated in said plant shall be such pro rata of Producer's gas as the total amount of gas available from all producers bears to the amount of gas which can be treated.

Operator shall not be obligated to treat gas hereunder when the quantity of gas produced is so small as to render the treatment of same unprofitable to Operator.

Producer agrees not to treat or cool gas produced on the above-described property in any manner that will cause the gasoline or a portion of the gasoline to be condensed or separated from the natural gas. Producer agrees to maintain the cas-

ingheads of all wells and all their connections thereon tight and in good condition to prevent an inleakage of air into the pipelines of Operator. Should there be an inleakage of air occasioned by Producer not maintaining its equipment in proper condition, a proportionate deduction shall be made in the monthly settlement.

8. Operator shall not be obligated to utilize any gas in its plant or plants which contains less than five-tenths (5/10) of a gallon of gasoline per one thousand (1000) cubic feet of gas unless Operator so desires. In event Operator shall refuse or neglect to take and utilize in its plant or plants any gas available on the above-described property for the reason that the gasoline content of the gas is less than five-tenths of a gallon per one thousand cubic feet, Operator agrees to use its best efforts and reserves the right to dispose of such gas in the same manner as provided for handling the residue dry gas from the plant or plants.

9. In event any suit is commenced either in law or in equity involving the title to the gas of Producer, or to the gasoline to which Producer is entitled under this agreement, or to any money to which Producer is entitled, then Operator during the pendency of any such suit may at its option either discontinue the taking of said gas until said suit be finally determined or may continue nevertheless to take said gas, and shall have the right thereupon to impound any moneys due to Producer to the joint account of Operator and Producer in

any national bank in the City of Los Angeles, State of California.

10. Operator shall be entitled to treat at and by means of said plant or plants such quantities of gas as it may desire to take from other producers. Operator shall meter separately the gas received from Producer and from other producers whose gas is so taken, and at least once a month shall test separately, according to a recognized method for testing gas, samples of gas received from Producer and from other producers. The amount of gasoline extracted from gas delivered by Producer shall be determined as a proportion of the total net gasoline extracted at such plant or plants, computed from said meter readings and said tests.

11. It is mutually understood and agreed that Operator shall be entitled to use, free of charge, as much of the residue dry gas remaining after the gasoline shall have been extracted as it may require for fuel and power in the operation of its plant. It is understood that "residue dry gas" as referred to in this agreement is the amount of dry natural gas remaining after deducting from the total amount of natural gas delivered for treatment the amount of gas lost or consumed through shrinkage due to the extraction of the natural gasoline contained therein.

Of the residue dry gas remaining after above deductions have been made, Operator agrees to cur-

rently return to Producer at the property line nearest to the existing dry gas lines of Operator as much of the residue dry gas as may be necessary for fuel purposes and other producing activities of Producer on the said premises; provided, however, that Operator shall not be obligated to deliver such gas at a pressure exceeding twenty (20) pounds per square inch at the plant of Operator making such delivery. It is understood and agreed that Operator may deliver dry gas to Producer in excess of the amount of residue dry gas credited to Producer, but in such event Producer hereby agrees to pay Operator for the excess dry gas delivered at the current market price of residue dry gas sold or delivered from the plant of Operator making such delivery to Producer; or in event Operator, in order to meet the dry gas requirements of Producer, is required to purchase dry gas in the open market, then in this event Producer agrees to reimburse Operator for the excess dry gas furnished to Producer, at the same price Operator is required to pay for same.

12. In the event Producer does not require all of the remaining residue dry gas to be returned to Producer for fuel purposes, then Operator will use its best efforts to sell the balance of the remaining dry gas. In the event of the sale of such remaining dry gas by Operator, Operator shall pay to Producer, on or before the 20th day of the next succeeding calendar month following that in which the sale occurs, sixty per cent (60%) of the pro-

ceeds derived by Operator from the sale of such remaining dry gas; provided, however, that in the event Operator is unable to sell the remaining dry gas, then in such event Operator shall be under no obligation whatsoever to Producer with respect to said remaining dry gas.

13. Producer shall at all reasonable times during business hours have access to the accounts and records of Operator insofar as they pertain to matters arising under this agreement or for the purpose of verifying statements made hereunder.

14. Producer shall be entitled to require Operator to test meters at intervals of at least once each month and oftener in event same is necessary. Producer shall have the privilege if it so desires of having a representative present during all testing of the gas or the checking of meters registering the gas from the above-described property.

15. Operator agrees to furnish Producer with a report not later than the twentieth of each month accounting for the gasoline produced and the dry gas returned for lease operations or sold. It is agreed that any and all objections to such reports must be made to Operator in writing not later than fifteen (15) days after receipt thereof by Producer; that the failure by Producer to make such objection in writing within said period of fifteen days shall create a conclusive presumption that such report is correct in all particulars, and that after said fifteen-day period shall have elapsed

without any such written objection having been made to Operator, Producer shall not thereafter have the right to question or dispute such report in any way.

16. In event at any time or from time to time Operator is required to pay any tax, license or governmental charge, directly or indirectly, upon that part of the gasoline manufactured from the gas of Producer to which Producer is entitled as royalty, or upon the proceeds of the sale of such royalty gasoline, Producer shall reimburse Operator for the full amount of such tax, license or governmental charge so paid by Operator.

17. Operator agrees to promptly pay, before the same become delinquent, all taxes which may be assessed or levied during the term of this agreement upon any property erected, placed or maintained by Operator upon any of the lands of Producer hereinabove described. In event that Operator fails so to do, Producer may pay any such tax and Operator shall reimburse Producer for all amounts so paid, with interest from the date of such payment at the rate of ten per cent (10%) per annum, upon demand being made therefor.

18. Operator shall not suffer any lien or liens to be filed against the plants, pipelines, machinery and equipment or any other property placed by it upon the lands of Producer, for work, labor, material or supplies furnished in connection therewith, and if any such lien or liens are filed thereon

Operator agrees to remove the same at its own expense and cost and shall pay any judgments which may be entered thereon or thereunder. Should Operator fail, neglect or refuse so to do, Producer shall have the right to pay any amount required to release any such lien or to defend any action brought thereon and to pay any judgment entered therein, and Operator shall be liable to Producer for all costs, damages and counsel fees and any amounts expended in defending any proceedings or the payment of any of said liens or any judgment obtained therefor.

19. The non-performance by either party of its obligations hereunder shall be excused so long and only to the extent that such performance is prevented by strikes, delays of transportation companies, interference of governmental authority, or other causes beyond the reasonable control of such party, whether similar or dissimilar to those above stated, or whenever and for so long as such performance is in violation of any governmental order or regulation.

20. It is understood and agreed that in the determining of any question of fact or dispute as to any matter which may arise under this contract, the same shall be determined by a board of arbitrators to be composed of one member appointed by Producer and one member appointed by Operator, and these two persons shall appoint a disinterested third person, and the decision of the majority of the board of arbitrators shall be binding upon both

parties hereto. The decision of the arbitrators shall be a condition precedent to the right of action in this contract.

21. No provision of this contract shall be interpreted contrary to the rules and regulations of any regulatory body of the United States or of the State of California, or of the County of Los Angeles, or of the City of Signal Hill.

22. The term of this agreement shall be for a period of five (5) years from and after the date hereof and so long thereafter as gas may be produced from any of the above-described properties.

23. In case of default by either party in the performance of its obligations hereunder and the continuance of such default for thirty (30) days after written notice thereof specifying the particulars of the default, the party not in default shall be entitled to terminate or suspend this agreement, and all rights and obligations hereunder shall thereupon cease and determine or be suspended accordingly.

24. Any notices hereunder shall be sent by registered mail, to Operator at 634 South Spring Street, Los Angeles, California, and to Producer at 622 Chapman Building, 756 South Broadway, Los Angeles, California, unless and until either thereof shall change the place of notice by written communication sent to the other by registered mail.

25. This agreement in all of its terms and conditions shall constitute a covenant running with

the lands hereinbefore described, and as such shall be binding upon the parties hereto and their respective assigns or successors in interest. Producer covenants and agrees with Operator that in event Producer shall at any time desire to convey, assign or transfer any rights in and to said lands, or any portion thereof, or in, to or under this agreement, to any third party that it will forthwith notify said third party of the terms and conditions of this agreement and require said third party as a part of any transaction involving any such conveyance, assignment or transfer to accept and agree to be bound by each and all thereof, thereafter submitting documentary evidence of all thereof to Operator.

In Witness Whereof, the parties hereto have caused this instrument to be executed the day and year first hereinabove written.

BANKLINE OIL COMPANY,

By /s/ H. J. BARNESON,
Vice President, and

/s/ E. J. CASE,
Asst. Secretary, "Operator."

JET OIL COMPANY,

By /s/ OWEN E. KUPFER,
President, and

/s/ M. A. EGAN,
Secretary, "Producer."

State of California,
County of Los Angeles—ss.

On this 25th day of June, 1936, before me, Nina M. Brockus, a Notary Public in and for the said County and State, personally appeared H. J. Barneson, known to me to be the Vice President, and E. J. Case, known to me to be the Assistant Secretary of Bankline Oil Company, the corporation that executed the within instrument, known to me to be the persons who executed the within instrument, on behalf of the corporation herein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

/s/ NINA M. BROCKUS,
Notary Public in and for Said
County and State.

State of California,
County of Los Angeles—ss.

On this 22nd day of June, 1936, before me, Christine Sand, a Notary Public in and for the said County and State, personally appeared Owen E. Kupfer, known to me to be the President, and M. A. Egan, known to me to be the Secretary of Jet Oil Company, the corporation that executed the within instrument, known to me to be the persons who executed the within instrument, on behalf

of the corporation herein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

/s/ CHRISTINE SAND,
Notary Public in and for Said County and State.

EXHIBIT No. 2-B

This Agreement, made and entered into this 1st day of December, 1950, by and between Bankline Oil Company, a California corporation, hereinafter designated as "Bankline," first party, and M. K. Doumani, hereinafter designated as "Producer," second party;

Witnesseth:

That, Whereas, Producer represents that it has the exclusive right to dispose of the natural gas produced by it from its wells located upon certain lands in the Long Beach oil field, Los Angeles County, California, which lands for the purpose of this agreement are for convenience hereinafter referred to as the "subject premises" and are described as follows:

M. K. No. 2 located on

W½ W½ N½ of Farm Lot 79, American Colony Tract of the City of Signal Hill, in the

County of Los Angeles, State of California, as per map recorded in Book 19, pages 89-90, Miscellaneous Records of said County.

And, Whereas, Bankline desires to receive from Producer for the purpose of extracting natural gasoline therefrom all of the natural gas which may be produced by Producer from its wells located on the subject premises, and Producer is willing and desires to deliver to Bankline all of the natural gas so produced from said premises during the time this agreement shall be in full force and effect, and hereby warrants its right and title to such natural gas;

Now, Therefore, in consideration of the mutual covenants herein contained and other good and valuable consideration, the receipt of which is hereby acknowledged, the parties hereto covenant and agree with each other as follows:

1. For the purpose of this agreement the following words or groups of words when used herein will have the following respective meanings, namely:

Gas—The term "gas" shall be deemed to mean all gas in its natural state and include as well all gas that may in any way or for any cause flow, arise, or be extracted from the wells on the subject premises and all condensate collected from gas after the delivery thereof into Bankline's gas gathering system.

Residual Gas—The term "residual gas" is defined as the amount of dry gas remaining from the total amount of gas delivered to Bankline for processing after deducting therefrom the amount of gas lost through shrinkage due to the extraction of the gasoline content thereof. This shrinkage factor shall, for the purpose of this agreement, be 27 cubic feet of gas for each gallon of gasoline extracted from the gas and 35 cubic feet of gas for each gallon of other liquefiable hydrocarbons extracted from such gas.

Gasoline—The term "gasoline" is defined as the product commonly known as natural gasoline of the quality currently manufactured at Bankline's Absorption Plant from the gas received from other sources.

Other Liquefiable Hydrocarbons—The term "other liquefiable hydrocarbons" is defined as propane and butane or mixtures thereof other than natural gasoline which may from time to time be manufactured or extracted in liquid form from the gas received and delivered hereunder.

2. Subject to the terms and conditions hereof, Producer agrees to deliver to Bankline and Bankline agrees to receive from Producer, for the purpose of extracting gasoline therefrom, all of the gas produced from Producer's wells located on the subject premises during the life of this agreement.

3. The delivery of all gas to Bankline hereunder

shall be made by Producer at gas traps installed by Producer at or adjacent to the wells for the purpose of separating the gas from the crude oil. Producer agrees to keep the casingheads and connections of all its wells tight and in good condition in order to prevent inleakage of air into the pipeline, and when any well or wells shall be taken out of service for repairs, or for any other purpose, to shut off such wells from the collection or gathering main by suitable stopcocks to be furnished by Bankline. Should there be any inleakage of air occasioned by Producer not maintaining its equipment in proper condition, the gas may be turned to air until the condition causing the inleakage of air shall have been corrected.

Bankline shall have the right to recover all gasoline condensed in the pipelines, sumps, or pipeline traps downstream from the point of measurement and testing, and the condensate so recovered by Bankline shall be considered as a part of the gas delivered to Bankline hereunder and shall be accounted for accordingly. Producer shall provide and install, as required by Bankline, suitable sumps or tanks in which to drain any crude oil collected in the pipelines through which gas is taken by Bankline from Producer hereunder.

4. Bankline shall furnish, install and maintain, at its own expense, all necessary pipelines and connections from the traps to the plant, as hereinafter provided. Producer hereby grants to Bankline, subject to its rights to do so, the right at all times

during the lift of this agreement to install required equipment and lines and maintain, repair, renew, replace and/or change the size of all necessary pipelines and other equipment installed by Bankline upon and across the subject premises, and shall at all times during the life of this agreement have full rights of ingress and egress.

Bankline shall indemnify Producer against and hold it harmless from any and all liability for damages to persons or property caused by the operations of Bankline on the subject premises.

5. Bankline shall maintain its plant, pipeline and other facilities in first class condition in order to avoid any unnecessary loss of gas from the time the gas enters the pipeline at the point or points where the gas is delivered to Bankline, and shall operate its plant wherein such gas is processed in an efficient and workmanlike manner consistent with usual and economic plant operations so that a maximum quantity of gasoline of the quality currently manufactured at its said plant will be extracted from the gas delivered to it hereunder.

6. The quantity of gasoline and other liquefiable hydrocarbons extracted and saved from the gas delivered to Bankline hereunder, which Bankline shall deliver to Producer as royalty, shall be fifty per cent (50%) of the total quantity of gasoline and other liquefiable hydrocarbons so extracted and saved from Producer's gas during each calendar month as determined by the test referred to in paragraph 7 hereof.

Producer shall have the right within thirty (30) days after giving Bankline notice of its intention to take payment of its royalty in money or in kind. An option once exercised to take such royalty either in money or in kind shall not be changed for at least thirty (30) days unless such change is agreed to by both of the parties hereto.

Producer shall be entitled to ten (10) days' free storage of its royalty gasoline and other liquefiable hydrocarbons in tanks provided by Bankline, provided, however, that such storage shall be at Producer's risk as to all loss by evaporation, fire and/or other causes beyond the reasonable control of Bankline. Delivery of Producer's royalty gasoline and other liquefiable hydrocarbons shall be made at the plant where produced or at some other point mutually agreeable to the parties hereto.

Deliveries of gasoline by Bankline to Producer hereunder shall be made, at Producer's option, either into tank trucks or pipelines installed and maintained by Producer. In the event the gasoline is loaded into tank trucks, the number of gallons delivered shall be computed on the basis of the number of gallons gauged in such tank trucks at time of loading. In the event the gasoline is delivered into pipeline, the number of gallons so delivered to Producer shall be computed on the basis of the number of gallons metered from Bankline's tanks from which such shipments are made. All such measurements of gasoline shall be corrected to a temperature of 60° Fahrenheit. All samples

for determining the quality of the gasoline delivered by one party to the other hereunder shall be taken from the trucks into which such deliveries are made or from the tanks from which pipeline shipments are made, depending upon the method of delivery.

In the event Bankline is not given notice of Producer's intention to take its royalty interest in kind, it shall be deemed that Producer desires to receive its royalty interest in money, and Bankline agrees to pay Producer a proportion of the total gross proceeds received by Bankline from the sale at its plant of the gasoline and other liquefiable hydrocarbons extracted by it from the gas delivered to it by Producer hereunder calculated at the hereinabove specified royalty rate.

If Producer shall not elect to take its royalty production in kind, and if in such event the gasoline extracted from the gas delivered and received hereunder is not sold by Bankline to third parties, then Bankline agrees to purchase Producer's said royalty share of such gasoline at the Standard Oil Company's posted price in the Long Beach oil field for gasoline of like Reid vapor pressure as the gasoline extracted by Bankline at its said plant during the same calendar month.

Royalty payments shall be made by Bankline to Producer on or before the 20th day of the calendar month next succeeding the month in which the gasoline is produced.

7. Bankline shall be entitled to process at and by means of its plant such quantities of gas as it may desire to take from operators other than Producer, provided, however, that in such event Bankline shall meter separately the gas received from Producer and from such other operators whose gas is so processed. As often as Bankline deems necessary, it shall test separately samples of gas received from Producer and from other operators whose gas is so received by Bankline, in accordance with the methods specified in California Natural Gasoline Association Bulletin No. TS-351, or revisions thereof. The natural gasoline content shall be determined by the rectified test, and the other hydrocarbon contents shall be determined by the difference getween the 30#-32° F test and the rectified test or any other method which shall be mutually agreed upon by Producer and Bankline.

For the purpose of determining the royalty to which Producer shall be entitled hereunder, it is agreed that the amount of gasoline and other liquefiable hydrocarbons extracted and saved from Producer's gas during each calendar month shall be a proportionate share of all of the gasoline and other liquefiable hydrocarbons produced and saved by Bankline at its Asborption Plant during said month. Said proportion shall bear the same relation to the total quantity of gasoline and other liquefiable hydrocarbons produced at said plant as the computed quantity of gasoline and other liquefiable hydrocarbons contained in Producer's gas

bears to the computed quantity of gasoline and other liquefiable hydrocarbons contained in all of the gas processed by Bankline during the same calendar month as determined from the meter readings and the tests herein mentioned. The aforesaid tests to determine the gasoline content of the gas delivered hereunder shall be made at a point as near the meter as is practicable and between the meter and the well or wells from which the gas is being received.

Bankline shall not be obligated to extract or manufacture from the gas delivered to it hereunder any liquefiable hydrocarbons other than the product commonly known as natural gasoline until such time as in its exclusive judgment the amount of such liquefiable hydrocarbons available for manufacture from the gas of Producer and of third parties which is processed in its plant can be disposed of in such quantities and at such prices as will justify the installation of the equipment and facilities necessary for their manufacture.

Producer shall be given at least twenty-four (24) hours' notice, written if demanded, of the time tests of the gas are to be made for determining the gasoline content thereof and/or the time the meters measuring the gas are to be inspected, calibrated, or adjusted, and shall be entitled to representation at all such times. The representative of Producer shall have full voice with the representative of Bankline as to the establishment of the gaso-

line content and the accuracy of the meter or meters measuring the gas received and delivered hereunder.

8. Bankline shall not be obligated to process the gas produced from Producer's wells on the subject premises for the extraction of the gasoline content thereof during such time as the average recoverable gasoline content of said gas is less than one-half gallon of 20.3-pound Reid vapor pressure gasoline per each thousand cubic feet of gas, determined in the manner specified in California Natural Gasoline Association Bulletin No. TS-351, or revisions thereof. In the event the average recoverable gasoline content of the gas shall be less than one-half gallon of 20.3-pound Reid vapor pressure gasoline per one thousand cubic feet of gas, at the option of Bankline all such gas may be handled and accounted for in the same manner as the residual gas available for delivery at the outlet of the plant, and in this event the gas shall be delivered to Bankline and marketed by Bankline under the same terms and conditions provided for the handling of and accounting for residual gas available for delivery to Producer or sale as specified in paragraph 9 hereof.

Bankline shall not be required to accept, process or handle the gas produced from any well or group of wells supplying gas to Bankline as a unit through one meter connection during such time as the total gas production from such well or group of wells is less than an average of fifty thousand (50,000) cubic feet per day; provided, however, that Bankline may accept, process or handle such gas

if it so desires, but its election to do so shall not bind it to continue to accept, process or handle such gas. Bankline shall not be required to accept from Producer hereunder any gas containing hydrogen sulphide in excess of five (5) grains per each one hundred (100) cubic feet of gas as determined by Tutweiler Test. Producer shall be entitled to make such other disposition as it may desire of the gas so rejected by Bankline in accordance with the terms of this provision. The suspension of operation by Bankline under such conditions shall not terminate or impair any of its right under this agreement with respect to other gas of Producer which is available to Bankline hereunder.

9. After the gas delivered and received hereunder shall have been processed for the extraction of the gasoline therefrom, Bankline shall be entitled to use, free of charge, such quantities of the residual gas as may be reasonably required for fuel purposes in connection with the operation of its plant; provided that the total volume of residual gas used by Bankline for fuel purposes in its plant shall be prorated among all of the operators delivering gas to Bankline's plant for processing on the basis of the total volume of gas delivered by each of said operators.

Bankline agrees to deliver to Producer for lease fuel, all of the residual gas it may need up to the total amount of residual gas remaining after deductions have been made for shrinkage and plant fuel as hereinabove provided. The delivery of such

dry gas to Producer shall be made to such lease described in this agreement as Producer may designate at a pressure of not less than five (5) pounds per square inch nor more than forty-five (45) pounds per square inch at the point of delivery.

Bankline agrees to use its best efforts to sell all of Producer's shares of such residual gas as is not required by Producer at the highest price it can obtain and to pay Producer fifty per cent (50%) of the total gross proceeds derived by Bankline from the sale of such gas, provided, however, that in the event all of the residual gas available for sale at the plant shall not be sold, Bankline shall prorate the total quantity of residual gas that is sold at such plant by Bankline to the various operators delivering gas to the plant for processing proportionally according to the respective amounts of residual gas available for sale by each operator.

Bankline shall not be required to store residual gas for future delivery to Producer.

Royalty payments covering the proceeds from the sale of residual gas shall be made by Bankline to Producer on or before the 20th day of the calendar month next succeeding that month in which the residual gas is sold.

10. Producer shall at all reasonable times during business hours have the right to inspect the records and accounts of Bankline relating to the production of gasoline and other liquefiable hydrocarbons in the plant wherein Producer's gas is processed here-

under for the purpose of determining the amount of gasoline and other liquefiable hydrocarbons produced, and the amount of residual gas sold and the selling price thereof, if any be sold.

11. Bankline agrees to furnish Producer with a report not later than the tenth (10th) day of each calendar month accounting for all gas received, gasoline and other liquefiable hydrocarbons produced, residual gas delivered to Producer, and residual gas sold during the preceding calendar month and such other pertinent data as Producer may require to enable it to determine the accuracy of Bankline's calculations.

12. Bankline agrees to take all gas which may be produced from Producer's wells on the subject premises and tendered to it by Producer at whatever pressure may be available at the outlet of Producer's gas traps or separators, provided, such gas traps and separators are installed and maintained by Producer in accordance with the provisions of paragraph 13 hereof. Producer warrants that it has the title to all gas delivered to Bankline hereunder.

Bankline shall not be accountable to Producer for any of Producer's gas which it is unable to process and/or conserve at its plant during the periods of peak production of any of Producer's wells. During the time or times when the total amount of gas available for processing in Bankline's plant from all sources is in excess of the capacity of Bankline's

said plant, Bankline's obligation to process Producer's gas hereunder shall be limited as follows: The plant capacity shall be allocated to the processing of gas available to Bankline for processing from Producer hereunder and all other operators in the Long Beach field in the same proportion that the total amount of gas so available from each of such other operators bears to the total amount of gas available from all of such operators.

13. Producer shall install and maintain at its sole expense all gas traps or oil and gas separators which are necessary and proper for efficiently separating the oil and gas produced by Producer on the subject premises in order to save and render available all of such gas for delivery to Bankline. Bankline shall have the right to inspect such equipment at all reasonable times.

Producer shall install at ground elevation all of the connections and other apparatus necessary for the delivery of the gas from its gas traps into Bankline's wet gas gathering system, including the regulators and other facilities necessary for maintaining the proper back pressure on the gas produced from Producer's wells on the subject premises and available for delivery to Bankline at such points.

14. Bankline shall install and maintain at its sole cost and expense a meter of standard make and design capable of accurately measuring all of the gas delivered and received hereunder from Producer's wells, it being understood that Bankline

shall not be required to install meters for measuring separately the gas produced from each of Producer's wells located on the subject premises.

All measurement of gas delivered and received hereunder shall be computed in cubic feet based on an absolute pressure of 14.73 pounds per square inch at a temperature of 60° Fahrenheit, in accordance with the procedure outlined in California Natural Gasoline Association Bulletin No. TS-353, or revisions thereof.

15. In the event that at any time or from time to time Bankline is required to pay any processing tax, or any other tax, license, or governmental charge, directly or indirectly, upon or measured by the gasoline and/or other liquefiable hydrocarbons manufactured from the gas of Producer which Producer receives as royalty, or the gasoline taken by it in exchange therefor, or upon the proceeds of the sale of such royalty gasoline or other liquefiable hydrocarbons, the manufacture thereof, or upon the production or transportation of the gas processed hereunder, or upon the dry gas delivered to Producer hereunder, or upon the proceeds of the sale of any dry gas to which Producer is entitled, Producer agrees to reimburse Bankline for the full amount of such processing tax, and/or any other tax, license or governmental charge paid by Bankline on or measured by Producer's share of such dry gas and/or gasoline and other liquefiable hydrocarbons. In the event Bankline is required to pay any severance or production tax on any gas

or gasoline delivered by Producer to Bankline, or any tax which is measured or allocated on production or severance of such gas and/or gasoline, Producer agrees to reimburse Bankline for the full amount of such severance or production tax, it being stipulated between the parties that the full incidence of such severance or production tax, regardless of the manner of levy or collection, shall be upon Producer.

16. Bankline agrees to pay promptly, before they become delinquent, all taxes which may be assessed or levied during the term of this agreement upon any property erected, placed and maintained by Bankline upon the subject premises. In the event Bankline fails so to do, Producer may pay any such tax and Bankline shall reimburse Producer for all amounts so paid, with interest from the date of such payment at the rate of seven per cent (7%) per annum, upon demand being made therefor.

17. Bankline shall not suffer any lien or liens to be filed against the plant, pipelines, machinery and/or equipment, or any other property placed by Bankline upon the subject premises for work, labor, materials or supplies furnished in connection therewith, and if any such lien or liens are filed thereon, Bankline agrees to remove the lien or liens at its own expense and cost and shall pay any and all judgments which may be entered thereon or thereunder. Should Bankline fail, neglect, or refuse so to do, Producer shall have the right to pay any amount required to release any such lien or

liens or to defend any action brought thereon, and to pay any judgment therein, and Bankline shall be liable to Producer for all costs, counsel fees, and any amounts expended in defending any proceeding or the payment of any of the liens or any judgment obtained therefor.

18. In the event of default on the part of either party to this agreement in the performance of its obligations under this agreement, and such default shall not be remedied by the party in default within ten (10) days after receiving written notice thereof specifying the particulars of the default, then the party giving such written notice shall have the right to terminate or suspend this agreement, and thereupon all rights and obligations shall cease and determine or be suspended accordingly.

19. Bankline shall be entitled to remove, from time to time and within a reasonable time after the termination of this agreement, all pipe lines, connections, meters and other equipment heretofore or hereafter installed by it on the subject premises. Bankline agrees to remove all of the piplines, connections, meters, pumps, and other equipment installed by Bankline upon the property of Producer within ten (10) days after receiving notice from Producer of Producer's intention to quitclaim its interest in such property.

20. All notices from Producer to Bankline may be sent by United States mail, postage prepaid, ad-

dressed to Bankline Oil Company, 437 South Hill Street, Los Angeles 13, California. All notices from Bankline to Producer may likewise be sent by United States mail, postage prepaid, addressed to M. K. Doumani, 6331 Hollywood Boulevard, Hollywood 28, California. Either party may change its mailing address to any other point within the State of California.

21. The non-performance by either party of its obligations hereunder shall be excused so long as such performance is prevented by accidents, fires, riots, strikes, lockouts and other labor disturbances, earthquakes, war, acts of God, acts of any government (whether foreign or domestic, federal, state, county or municipal), total or partial failure of transportation or delivery facilities or supplies, or any cause beyond the reasonable control of such party, whether similar to the foregoing causes or not. If this contract, the performance thereof, or any matter or thing connected therewith, be in conflict with any law, ordinance or regulation, whether of federal, state, or of lesser political subdivision, then the performance thereof may be discontinued while so in conflict therewith.

22. This agreement shall become effective as of the date hereof and, except as hereinbefore provided, shall remain in full force and effect for a period of five (5) years and thereafter for so long as Producer operates aforesaid properties or either or any of them.

23. This agreement shall continue in force and be binding upon the parties hereto, their successors and assigns, for and during the term and period of this agreement, and Bankline shall be free from time to time, as it may elect, to turn over gas received hereunder to another operator or plant for processing, in which event all of the provisions hereof shall continue to apply in like manner as though Bankline processed such gas in its plant.

In Witness Whereof, the parties hereto have executed this instrument in duplicate by their proper officers, who are thereunto duly authorized, on the day and year first above written.

[Seal] BANKLINE OIL COMPANY,

By /s/ L. L. AUBERT,
President, and

/s/ E. J. CASE,
Assistant Secretary.

M. K. DOUMANI,

/s/ M. K. DOUMANI,
Producer.

EXHIBIT No. 2-C

This Agreement, made and entered into this 6th day of December, 1932, by and between Bankline Oil Company, a California corporation, hereinafter designated as "Operator," and D. D. Dunlap, an individual, hereinafter designated as "Producer,"

Witnesseth

That

Whereas, Producer is the owner and/or lessee of those certain parcels of land situated in Signal Hill oil field, Los Angeles County, California, described as follows, to wit:

> Lot "A" of the Weber Tract, as per map in Book 9, Page 87 of Maps, Records of Los Angeles County, California;

and

Whereas, Producer is the owner and/or lessee of the above described premises and is the owner of the natural gas produced therefrom and hereby guarantees his right and title to same; and

Whereas, Operator has erected and is operating a plant or plants in the Signal Hill oil field for the purpose of treating gas for the extraction of gasoline therefrom; and

Whereas, Operator in order to augment its supply of gas for said plant or plants desires to purchase and/or receive from Producer all of the gas which may be produced by Producer from the property above described, and Producer is willing and desires to sell and/or deliver to Operator all of the gas produced by Producer from the above-described property and hereby guarantees its right and title to same:

Now, Therefore, in consideration of the premises and of the covenants, agreements and payments

hereinafter set forth and other valuable considerations, the receipt of which is hereby acknowledged, the parties hereto covenant and agree with each other as follows:

1. Producer hereby agrees to furnish and deliver to Operator and Operator agrees to take and utilize in its plant or plants, subject to the terms and conditions of this agreement, natural gas produced from the above-described property during the life of this agreement except as provided in paragraphs seven, eight and nine hereof.

2. All gasoline condensed in the lines, pumps or traps of said Producer shall be considered as a part of the gas to be delivered to Operator and shall be accounted for by Operator as gasoline extracted from said gas.

3. Operator is granted the exclusive right to treat gas produced from the above described property for and during the period of this agreement.

4. Producer shall deliver the gas at the casing heads and/or at gas traps installed by Producer on the premises above described. Producer agrees to use his best efforts to prevent the inleakage of air in traps or lines. Operator shall furnish, install and maintain all pipe lines and connections from casing heads or traps to its plant or plants and such meters as may be necessary for the accurate measurement of the gas received from the property.

5. Producer, insofar as he has the right to do so, shall furnish right of ways for such pipe lines

and connections on the property. Producer hereby grants to Operator a right of way for its employees and vehicles over and across the lands of Producer hereinabove described for any and all purposes necessary or proper in connection with the business of Operator insofar as it pertains to the functions to be performed by Operator under the terms of this agreement. Operator shall be entitled to remove, within a reasonable time after the termination of this agreement, all pipe lines, connections, meters and other equipment installed by it.

6. Operator agrees to pay to Producer as royalty fifty per cent (50%) of the proceeds derived from the sale of gasoline extracted from said gas, or at Producer's option, as hereinafter provided, to deliver to Producer as royalty fifty per cent (50%) of the gasoline extracted from said gas.

Producer shall have the right to take his royalty gasoline in kind if he so desires, provided that he shall in such event serve Operator with thirty (30) days' advance notice in writing of such intention. An option once exercised to take such royalty either in cash or in kind shall not be changed for at least six (6) months unless agreed to by both parties hereto.

In event royalty gasoline shall be paid in kind, Operator shall provide ten (10) days' free storage of the royalty gasoline belonging to Producer in tanks provided by Operator; provided, however, that such storage shall be at Producer's risk as to all loss by evaporation, fire and/or other causes beyond the reasonable control of Operator.

In event Producer fails to remove said royalty gasoline from the tanks of Operator within the said ten-day period, Operator shall not be obligated to deliver said royalty gasoline to Producer except at such times and in such quantities as will not interfere with the sales and/or deliveries of gasoline which Operator is otherwise required to make from said plant.

Royalty payments shall be made by Operator to Producer on or before the 20th day of each calendar month next succeeding that in which the gasoline is produced.

7. It is understood that Producer is operating his property primarily for oil production and Operator agrees to handle the gas produced from Producer's property at pressures which in the opinion of Producer will not interfere with the production of oil from the leases. It is understood and agreed by and between the parties hereto that during the period of flush production or in event Producer insists on maintaining extremely low pressures on casingheads or gas traps, Operator shall not be obligated to take, treat or pay for gas produced and/or vented during such periods.

In event that the amount of gas produced from the properties of Producer, together with the amount of gas produced from properties of other producers with whom Operator has contracts for the treatment of gas, exceeds the capacity of the plant of Operator and said excess quantity is not sufficiently permanent in the judgment of Operator to

justify the construction of additional plant capacity, then during the period of said excess production the amount of gas of Producer treated in said plant shall be such pro rata of Producer's gas as the total amount of gas available from all producers bears to the amount of gas which can be treated.

Operator shall not be obligated to treat gas hereunder when the quantity of gas produced is so small as to render the treatment of same unprofitable to Operator.

Producer agrees not to treat or cool gas produced on the above described property in any manner that will cause the gasoline or a portion of the gasoline to be condensed or separated from the natural gas. Producer agrees to maintain the casingheads of all wells and all their connections thereon tight and in good condition to prevent an inleakage of air into the pipe lines of Operator. Should there be an inleakage of air occasioned by Producer not maintaining its equipment in proper condition, a proportionate deduction shall be made in the monthly settlement.

8. Operator shall not be obligated to utilize any gas in its plant or plants which contains less than five-tenths (5/10) of a gallon of gasoline per one thousand (1,000) cubic feet of gas unless Operator so desires. In the event Operator shall refuse or neglect to take and utilize in its plant or plants any gas available on the above described property for the reason that the gasoline content of the gas is less than five-tenths (5/10) of a gallon per one thousand

cubic feet, Operator agrees to use its best efforts and reserves the right to dispose of such gas in the same manner as provided for handling the residue dry gas from the plant or plants.

9. In event any suit is commenced either in law or in equity involving the title to the gas of Producer, or to the gasoline to which Producer is entitled under this agreement, or to any money to which Producer is entitled, then Operator during the pendency of any such suit may at its option either discontinue the taking of said gas until said suit be finally determined or may continue, nevertheless, to take said gas, and shall have the right thereupon to impound any moneys due to Producer to the joint account of Operator and Producer in any national bank in the city of Los Angeles, state of California.

10. Operator shall be entitled to treat at and by means of said plant or plants such quantities of gas as it may desire to take from other producers. Operator shall meter separately the gas received from Producer and from other producers whose gas is so taken and at least once a month shall test separately, according to a recognized method for testing gas, samples of gas received from Producer and from other producers. The amount of gasoline extracted from gas delivered by Producer shall be determined as a proportion of the total net gasoline extracted at such plant or plants, computed from said meter readings and said tests.

11. It is mutually understood and agreed that Operator shall be entitled to use, free of charge, as much of the resultant dry gas remaining after the gasoline shall have been extracted as it may require for fuel and power in the operation of its plant.

Of the dry gas remaining after above deductions have been made, Operator agrees to currently return to Producer at the property line nearest to the existing dry gas lines of Operator as much of the residue dry gas as may be necessary for fuel purposes and other producing activities of Producer on the said premises; provided, however, that Operator shall not be obligated to deliver such gas at a pressure exceeding twenty (20) pounds per square inch at the plant of Operator making such delivery. It is understood and agreed that Operator may deliver dry gas to Producer in excess of the amount of residue dry gas credited to Producer, but in such event Producer hereby agrees to pay Operator for the excess dry gas delivered at the current market price of residue dry gas sold or delivered from the plant of Operator making such delivery to Producer; or in event Operator, in order to meet the dry gas requirements of Producer, is required to purchase dry gas in the open market, then in this event Producer agrees to reimburse Operator for the excess dry gas furnished to Producer, at the same price Operator is required to pay for same.

12. In event Producer does not require all of the gas to be returned for the above-mentioned purposes, then Operator will use its best efforts to sell

the balance of the dry gas. In event of the sale of such residue dry gas by Operator, Operator shall pay to Producer on or before the 20th day of the next succeeding calendar month following that in which the sale occurs, seventy-five per cent (75%) of the proceeds derived by Operator from the sale of such residue dry gas; provided, however, that in event Operator is not able to sell the resulting dry gas or for any other reason fails and/or neglects to sell the resulting dry gas, then in such an event Operator shall be under no obligation whatsoever to Producer with respect to said dry gas.

13. Producer shall at all reasonable times during business hours have access to the accounts and records of Operator insofar as they pertain to matters arising under this agreement or for the purpose of verifying statements made hereunder.

14. Producer shall be entitled to require Operator to test meters at intervals of at least once each month and oftener in event same is necessary. Producer shall have the privilege, if he so desires, of having a representative present during all testing of the gas or the checking of meters registering the gas from the above described property.

15. Operator agrees to furnish Producer with a report not later than the 20th of each month accounting for the gasoline produced and the dry gas returned for lease operations or sold. It is agreed that any and all objections to such reports must be made to Operator in writing not later than fifteen

(15) days after receipt thereof by Producer; that the failure by Producer to make such objection in writing within said period of fifteen days shall create a conclusive presumption that such report is correct in all particulars and that after said fifteen-day period shall have elapsed without any such written objection having been made to Operator, Producer shall not thereafter have the right to question or dispute such report in any way.

16. In event at any time or from time to time Operator is required to pay any tax, license or governmental charge, directly or indirectly, upon that part of the gasoline manufactured from the gas of Producer to which Producer is entitled as royalty or upon the proceeds of the sale of such royalty gasoline, Producer shall reimburse Operator for the full amount of such tax, license or governmental charge so paid by Operator.

17. Operator agrees to promptly pay, before the same become delinquent, all taxes which may be assessed or levied during the term of this agreement upon any property erected, placed or maintained by Operator upon any of the lands of Producer hereinabove described. In event that Operator fails so to do, Producer may pay any such tax and Operator shall reimburse Producer for all amounts so paid, with interest from the date of such payment at the rate of ten (10) per cent per annum, upon demand being made therefor.

18. Operator shall not suffer any lien or liens to be filed against the plants, pipelines, machinery

and equipment or any other property placed by it upon the lands of Producer, for work, labor, material or supplies furnished in connection therewith, and if any such lien or liens is filed thereon Operator agrees to remove the same at its own expense and cost and shall pay any judgments which may be entered thereon or thereunder. Should Operator fail, neglect or refuse so to do Producer shall have the right to pay any amount required to release any such lien or to defend any action brought thereon and to pay any judgment entered therein, and Operator shall be liable to Producer for all costs, damages and counsel fees and any amounts expended in defending any proceedings or the payment of any of said liens or any judgment obtained therefor.

19. The non-performance by either party of its obligations hereunder shall be excused so long and only to the extent that such performance is prevented by strikes, delays of transportation companies or other causes beyond the reasonable control of such party, whether similar or dissimilar to those above stated.

20. It is understood and agreed that in the determining of any question of fact or dispute as to any matter which may arise under this contract, the same shall be determined by a board of arbitrators to be composed of one member appointed by Producer and one member appointed by Operator and these two persons shall appoint a disinterested third person and the decision of the majority of the board

of arbitrators shall be binding upon both parties hereto. The decision of the arbitrators shall be a condition precedent to the right of action in this contract.

21. No provision of this contract shall be interpreted contrary to the rules and regulations of any regulatory body of the United States or of the State of California.

22. The term of this agreement shall be for a period of five (5) years from and after the date hereof and so long thereafter as gas may be produced in paying quantities from the above described property.

23. In case of default by either party in the performance of its obligations hereunder and the continuance of such default for thirty (30) days after written notice thereof specifying the particulars of the default, the party not in default shall be entitled to terminate or suspend this agreement and all rights and obligations hereunder shall thereupon cease and determine or be suspended accordingly.

24. All notices from Producer to Operator shall be sent by United States mail, postage prepaid, addressed to Bankline Oil Company, 634 South Spring Street, Los Angeles, California. All notices from Operator to Producer shall be likewise sent by United States mail, postage prepaid, addressed to D. D. Dunlap, Box 1147 East Burnett Street, Long Beach, California. Either party may change

its mailing address to any other point within the State of California.

25. This agreement shall continue in force and be binding upon the parties hereto, their heirs, executors, administrators, successors and/or assigns for and during the term and period of this agreement.

In Witness Whereof, the parties hereto have here-unto set their signatures and seals the day and year first above written.

[Seal] BANKLINE OIL COMPANY

By /s/ H. J. BARNESON,
Vice President, and

/s/ E. J. CASE,
"Operator."

/s/ D. D. DUNLAP,
"Producer."

State of California,
County of Los Angeles—ss.

On this 17th day of January, in the year nineteen hundred and 33, A.D., before me, Nina M. Brockus, a Notary Public in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared D. D. Dunlap, personally known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

/s/ NINA M. BROCKUS,
Notary Public in and for Los Angeles County, State of California

EXHIBIT No. 2-D

(Copy)

This Agreement, made and entered into this 9th day of June, 1922, by and between the General Petroleum Corporation, a corporation organized and existing under and by virtue of the laws of the State of California, hereinafter called the first party, and the Bankline Oil Company, likewise a California corporation, hereinafter called the second party,

Witnesseth:

That, whereas, the first party is the holder and owner of certain leases in what is known as the Signal Hill District, and

Whereas, first party desires to sell and second party desires to buy upon a royalty basis the gasoline which may be extracted from the gas produced by the first party from said lands in the Signal Hill District;

Now, therefore, in consideration of the sum of

Ten ($10.00) Dollars each to the other in hand paid, receipt of which is hereby acknowledged, and the faithful performance of the covenants hereinafter expressed, it is agreed as follows:

First: The party of the second part will erect, equip, maintain and operate upon what is known as the Jasper Lease, being the east six hundred and sixty (660′) feet of the north six hundred and thirty (630′) feet of Block sixty-four (64), American Colony Tract, as per map recorded in Book nineteen (19), page eight (8), Miscellaneous Records of Los Angeles County, a plant or plants for the recovery of gasoline from casing-head gas, and will lay, maintain, remove and replace any and all pipe necessary to the operation of said plant or plants. However, the erection, operation and maintenance of said plant or plants shall in no manner interfere with the proper and efficient working or development of said lands above described, nor any part thereof, by the said first party, for the production of oil therefrom.

Second: The said party of the second part agrees to immediately commence preparations for the erection, maintenance and operation of an absorption plant for extracting the gasoline from the natural or casing-head gas produced by said party of the first part in said Signal Hill District, and to complete the same and have it in operation within ninety (90) days from the date of the execution of this contract. Such plant or plants shall be of sufficient size and capacity to treat all the gas of the

kind and quality hereinafter described that may be produced by said party of the first part from said premises, and the said party of the second part agrees that such plant or plants shall be of such efficiency as to remove approximately ninety (90) per cent of all of the recoverable gasoline content which such natural gas carries; and further agrees to provide suitable and efficient apparatus for protection against fire and to use only skilled and efficient help to keep the premises in and about the plant in a neat, clean and workmanlike manner; and further agrees to keep the plant in full operation continuously subject only to fires, strikes, acts of God, public enemies and other causes beyond the control of the second party, so long as not less than one million feet of gas per day shall be delivered by the first party to the second party.

Third: The second party further agrees to submit for approval to the first party plants and drawings of said plant previous to the installation thereof.

Fourth: It is understood and agreed that the first party is operating the wells in the Signal Hill District primarily for oil production and may at any time discontinue production on any or all thereof or redrill the same or make any changes in the operation of such wells or any of them, as in its judgment it may deem desirable, regardless of the effect such change may have on the amount or quality of the gas produced; and it is further

understood that the first party has not made and does not make any representations whatsoever as to the quantity, quality or pressure of gas.

Fifth: The first party hereby agrees to deliver to the second party at the traps or casing heads of the wells in said Signal Hill District during the life of this agreement as hereinafter set forth, all gas which is now or which may be hereafter produced by the first party from any or all wells located in said Signal Hill District, and the said second party shall have the right to apply such vacuum if any as the first party shall hereafter indicate, and the vacuum to be applied to such wells may be changed from time to time as conditions in such wells warrant, but such change can only be made upon the sanction and consent in writing of said first party.

Sixth: The second party agrees to pay to the first party for said gas a royalty based upon the average daily production of gasoline for any calendar month at the rate of thirty-three and one-third (33⅓%) per cent of the gross amount of the gasoline extracted from the aforesaid gas.

Seventh: The first party hereby reserves the right to take the royalty either in money or gasoline, and further reserves the right to approve any contract the second party may make for the sale of the royalty gasoline in the event the first party elects to accept its royalty in money. An option once exercised to take either in money or in kind shall not be changed for at least six months. In the absence

of any written notice, it shall be deemed that the party of the first part elects to take its royalty in money.

Eighth: It is understood and agreed that in the event the first party elects to accept its royalty in money, it is to receive payment on the tenth day of the month for the production of the previous calendar month, and in the event the first party elects to accept its royalty in gasoline the same shall be stored free of charge by the second party for a period of ten days from and after the first day of the month following that in which the gasoline is produced.

Ninth: In this connection it is distinctly understood and agreed that the party of the second part shall not be obligated to make such installation or to treat gas containing four-tenths (4/10) of one gallon of gasoline per thousand cubic feet or less; unless the party of the second part may so elect, and in the event the said party of the second part shall refuse to treat gas containing four-tenths (4/10) or less of one gallon of gasoline per thousand cubic feet, the party of the first part may sell and dispose of such gas in any manner it may so desire.

Tenth: The second party agrees to deliver to the party of the first part after treatment a minimum of seventy (70%) per cent of the gas collected from the wells and put into the plant for treatment, and further agrees to deliver such gas at a pressure

sufficient to enable the first party to deliver said gas to a compressor plant to be erected adjacent to the plant of the second party, such pressure to be not less than ten pounds to the square inch, and in no event shall such pressure exceed one hundred pounds to the square inch unless at the consent of the first party.

Eleventh: It is further agreed that the second party shall have the privilege and option of treating gas in said plant other than that received from the first party, but it is distinctly understood and agreed that in this event orifice meters shall be installed on incoming and outgoing gas to and from the different owners, in order that at all times first party will secure and receive proper credit for the gas produced by it from its wells and received by the second party.

Twelfth: It is further agreed that the first party shall have free access to the plant at all times during business hours and that the books of the second party insofar as they refer to the affairs of the first party shall be open to its inspection.

Thirteenth: The second party agrees to erect such storage tanks upon the property as may be necessary to store the gasoline produced in said plant, and such tanks shall be insulated and of such type and equipment as to prevent an undue amount of evaporation.

Fourteenth: It is further agreed that the first party shall furnish the second party the pro rata

quantity of fuel used by the second party in the operation of said plant, and such pro rata quantity of fuel shall be based upon the total volume of gas handled in said plant.

Fifteenth: The second party further agrees to protect and hold harmless the first party on account of any litigation or damages that may arise by reason of method of treatment applied by said second party to said gas, or the design of the plant erected upon said premises, and also agrees to hold first party harmless on account of any accident or injury to any person or persons or any surrounding property that may arise out of the erection or operation or maintenance of said plant, and to pay all County, State and Government taxes that may be levied against said plant or its operation, not including taxes which the first party is required to pay on account of the royalty it received from the extraction of such gasoline.

Sixteenth: The first party hereby guarantees that it is the owner of and is lawfully entitled to deliver to said second party such gas as is now produced or may hereafter be produced in the said Signal Hill District, and will hold harmless said second party on account of any litigation that may hereafter arise between the parties hereto and any third party on account of the failure or pretended failure of the first party to deliver such gas to any other person or corporation than the second party hereto.

Seventeenth: In the event said second party shall treat in said plant gas other than that produced by

Witnesseth:

Whereas, the parties hereto have heretofore entered into a certain agreement, dated June 9, 1922, relating to treatment of natural gas for the extraction of gasoline therefrom, and certain practices have developed out of verbal agreements in respect thereto, which the agreement has not been formally modified to cover; and

Whereas, the parties hereto mutually desire to provide for the continuance of such arrangements by modification of said agreement.

Now, Therefore, in consideration of the premises and mutual covenants herein contained and other valuable consideration, the receipt of which is hereby acknowledged, the parties hereto covenant and agree with each other as follows:

1. Bankline hereby agrees to pay to Midway Gas Company the compression charges on the natural gas from General's leases to Bankline's Signal Hill Absorption Plant, in accordance with the following schedule, which has been heretofore agreed to:

Three (3) cents per one thousand (1,000) cubic feet, when the average daily volume during any particular calendar month is greater than four (4) million cubic feet.

Three and one-half (3½) cents per one thousand (1,000) cubic feet, when the average daily volume during any particular calendar month is between four (4) million and two (2) million cubic feet.

Four (4) cents per one thousand (1,000) cubic feet, when the average daily volume during any particular calendar month is less than two (2) million cubic feet.

Payments to be made by Bankline to Midway Gas Company on or before the twenty-fifth (25th) day of each month for the gas compressed by Midway Gas Company during the preceding calendar month.

2. General agrees to pay Bankline, on or before the twentieth (20th) of the month next succeeding that in which the dry gas is sold from Bankline's Signal Hill Absorption Plant, fifty (50) per cent of the gross proceeds derived from the sale of surplus residue dry gas to which General may be entitled, if any gas be sold. Gross proceeds are hereby defined as the amount of money received for the gas sold, less the amount of money paid to General Pipe Line Company for the use of their pipeline extending from Bankline's Signal Hill Absorption Plant to the General Pipe Line Company's Cherry Pump Station. It is understood and agreed that the payment of the fifty (50) per cent above mentioned is to be made only on actual sales of residue dry gas and is not intended to include dry gas delivered to General's leases for development or operation of same.

3. It is agreed that Section Fourteen (14) of the agreement of June 9, 1922, above referred to is hereby revised to read as follows:

"It is further agreed that the First Party shall furnish Second Party the pro rata quantity of fuel

used by Second Party in the operation of said plant, and such pro rata quantity of fuel shall be based upon the total volume of wet gas handled in said plant, provided further, however, that the pro rata share of the fuel furnished by First Party shall not exceed thirty (30) per cent of the volume of wet gas from First Party's leases furnishing wet gas to said plant."

"First Party" refers to General Petroleum Corporation of California and "Second Party" refers to Bankline Oil Company.

4. General hereby grants to Bankline the privilege of using the existing dry gas distributing system owned by General and at present in use by Bankline, for the purpose of transporting residual dry gas to General's leases for use in connection with the development and/or operation of same and also for the purpose of delivering, upon General's order, residual dry gas to any point selected by General, provided, however, that point of delivery of the gas is located on or adjacent to the said dry gas distributing system mentioned herein.

General also hereby grants to Bankline the privilege of using General's existing dry gas distributing system referred to above for the purpose of delivering residual dry gas from Bankline's Signal Hill Absorption Plant to properties owned by persons, firms or corporations other than General with whom Bankline has contractual obligations concerning treatment of wet gas and redelivery of the residual dry gas for development and/or operation of the

property; provided, however, that owing to the fact that no charge is made to Bankline for such use of General's dry gas distributing system, Bankline shall discontinue the use of General's dry gas distributing system for the purpose of delivering residual dry gas to persons, firms or corporations other than General if and when, in General's opinion, such use of the said dry gas distributing system shall interfere with the delivery of gas to General.

It is understood and agreed by and between the parties hereto that nothing contained in Sections 4 or 5 hereof shall be construed as obligating General to extend the dry gas system herein mentioned or to lay additional pipelines to enable Bankline to deliver residual dry gas to comply with its contractual obligations.

5. Bankline agrees to erect, install and maintain sufficient orifice meters or other approved measuring devices capable of accurately measuring all of the gas transported by means of the wet gas and dry gas distributing systems mentioned in Section 4 hereof and to test the meters at least twice each month, at intervals of approximately fifteen (15) days, at which times General shall have the right to have a representative present to witness the tests made.

Bankline also agrees, at its own expense, to compute the volume of gas passed through the meters as shown on the meter charts, rendering a statement of the computed volumes to General for verification, within five (5) days after the date meter chart was

removed from the meter. General agrees to check the reading of the charts and to return same to Bankline, together with a list of discrepancies found, if any be found, within five (5) days after the receipt thereof by General.

6. All the terms and provisions of the above-mentioned contract of June 9, 1922, shall remain in full force and effect except as the same are herein specifically modified.

7. The term of this agreement shall be coexistent with the said agreement first above referred to, dated June 9, 1922, by and between the parties hereto.

In Witness Whereof, the parties hereto have hereunto set their signatures and seals the day and year first above mentioned.

[Corporate Seal]

GENERAL PETROLEUM CORPORATION OF CALIFORNIA,

By R. E. MAYNARD,
Vice-President;

By D. W. WOODS,
Secretary.

[Corporate Seal]

BANKLINE OIL COMPANY,

By H. J. BARNESON,
Vice-President;

By VICTORIA H. BERGER,
Asst. Secretary.

Acknowledged on September 20, 1927, by H. J. Barneson, Vice-President and Victoria H. Berger, Asst. Secretary of Bankline Oil Company before Nina M. Brockus, N.P. Los Angeles County.

EXHIBIT No. 2-E

Agreement for the Treatment of Natural Gas

This Agreement, made and entered into this 1st day of October, 1938, by and between Bankline Oil Company, a California corporation, hereinafter designated as "Operator," and Incorporated Production Co., hereinafter designated as "Producer,"

Witnesseth:

Whereas, Producer is the owner and/or lessee of those certain parcels of land situated in the Signal Hill oil field, Los Angeles County, California, described as follows, to wit:

> That certain portion of Farm Lot Fifty-nine (59) of the American Colony Tract, in the County of Los Angeles, State of California, as per map recorded in Book 19, Pages 89 and 90, Miscellaneous Records of said County, and more particularly described as follows:
>
> Beginning at the Southeasterly corner of Farm Lot Fifty-nine (59) as per map thereof recorded in Book 19, Pages 89 and 90 et seq., Miscellaneous Records of Los Angeles County,

California; thence westerly along the Southerly line of said Farm Lot Fifty-nine (59) one hundred eighteen (118) feet to a point; thence north sixty-eight (68) degrees, nineteen minutes (19′) east one hundred sixty-seven and eighty-seven hundreds (167.87) feet to a point; thence east fifty-six (56) feet to a point in the easterly line of said Farm Lot Fifty-nine (59) one hundred fifty-six (156) feet to the point of beginning.

and

Whereas, Producer is the owner and/or lessee of the above-described premises and is the owner of the natural gas produced therefrom and hereby guarantees its right and title to same; and

Whereas, Operator has erected and is operating a plant or plants in the Signal Hill oil field for the purpose of treating natural gas for the extraction of natural gasoline therefrom; and

Whereas, Operator, in order to augment its supply of natural gas for said plant or plants, desires to purchase and/or receive from Producer all of the natural gas which may be produced by Producer from the property above described, and Producer is willing and desires to sell and/or deliver to Operator all of the natural gas produced by Producer from the above-described property, and hereby guarantees its right and title to same;

Now, Therefore, in consideration of the premises and of the covenants, agreements and payments

hereinafter set forth and other valuable considerations, the receipt of which is hereby acknowledged, the parties hereto covenant and agree with each other as follows:

1. Producer hereby agrees to furnish and deliver to Operator and Operator agrees to take and utilize in its plant or plants, subject to the terms and conditions of this agreement, all natural gas produced from the above-described property during the life of this agreement, except as provided in paragraphs 7, 8 and 9 hereof.

2. All natural gasoline condensed in the lines, pumps, or traps of said Producer shall be considered as a part of the natural gas to be delivered to Operator and shall be accounted for by Operator as natural gasoline extracted from said natural gas.

3. Operator is granted the exclusive right to treat natural gas produced from the above-described property for and during the period of this agreement.

4. Producer shall deliver the natural gas at the casingheads and/or at gas traps installed by Producer on the premises above described. Producer agrees to use its best efforts to prevent the inleakage of air in traps or lines. Operator shall furnish, install and maintain all pipelines and connections from casingheads or traps to its plant or plants and such meters as may be necessary for the accurate measurement of the natural gas received from the property.

5. Producer, in so far as it has the right to do so, shall furnish rights of way for such pipelines and connections on the property. Producer hereby grants to Operator a right of way for its employees and vehicles over and across the lands of Producer hereinabove described for any and all purposes necessary or proper in connection with the business of Operator in so far as it pertains to the functions to be performed by Operator under the terms of this agreement. Operator shall be entitled to remove, within a reasonable time after the termination of this agreement, all pipelines, connections, meters and other equipment installed by it.

6. Operator agrees to pay to Producer as royalty 33⅓ per cent .... of the proceeds derived from the sale of natural gasoline extracted from said natural gas, or, at Producer's option as hereinafter provided, to deliver to Producer as royalty 33⅓ per cent .... of the natural gasoline extracted from said natural gas.

Producer shall have the right to take its royalty natural gasoline in kind if it so desires, provided that it shall in such event serve Operator with thirty (30) days' advance notice in writing of such intention. An option once exercised to take such royalty either in cash or in kind shall not be changed for at least six (6) months unless agreed to by both parties hereto.

In event royalty natural gasoline shall be paid in kind, Operator shall provide ten (10) days' free storage of the royalty natural gasoline belonging to

Producer in tanks provided by Operator; provided, however, that such storage shall be at Producer's risk as to all loss by evaporation, fire and/or other causes beyond the reasonable control of Operator.

In event Producer fails to remove said royalty natural gasoline from the tanks of Operator within the said ten-day period, Operator shall not be obligated to deliver said royalty natural gasoline to Producer except at such times and in such quantities as will not interfere with the sales and/or deliveries of natural gasoline which Operator is otherwise required to make from said plant.

Royalty payments shall be made by Operator to Producer on or before the 20th day of each calendar month next succeeding that in which the natural gasoline is produced.

7. It is understood that Producer is operating its property primarily for oil production, and Operator agrees to handle the natural gas produced from Producer's property at pressures which in the opinion of Producer will not interfere with the production of oil from the leases. It is understood and agreed by and between the parties hereto that durand the period of flush production, or in event Producer insists on maintaining extremely low pressures on casingheads or gas traps, Operator shall not be obligated to take, treat or pay for natural gas produced and/or vented during such periods.

In event that the amount of natural gas produced from the properties of Producer, together

with the amount of natural gas produced from properties of other producers with whom Operator has contracts for the treatment of natural gas, exceeds the capacity of the plant or plants of Operator, and said excess quantity is not sufficiently permanent in the judgment of Operator to justify the construction of additional plant capacity, then during the period of said excess production the amount of natural gas of Producer treated in said plant shall be such pro rata of Producer's natural gas as the total amount of natural gas available from all producers bears to the amount of natural gas which can be treated.

Operator shall not be obligated to treat natural gas hereunder when the quantity of natural gas produced is so small as to render the treatment of same unprofitable to Operator.

Producer agrees not to treat or cool natural gas produced on the above-described property in any manner that will cause the natural gasoline or a portion of the natural gasoline to be condensed or separated from the natural gas. Producer agrees to maintain the casing heads of all wells and all their connections thereon tight and in good condition to prevent an inleakage of air into the pipelines of Operator. Should there be an inleakage of air occasioned by Producer not maintaining its equipment in proper condition, a proportionate deduction shall be made in the monthly settlement.

8. Operator shall not be obligated to utilize any natural gas in its plant or plants which contains

less than five-tenths (5/10) of a gallon of natural gasoline per one thousand (1000) cubic feet of gas unless Operator so desires. In event Operator shall refuse or neglect to take and utilize in its plant or plants any natural gas available on the above-described property for the reason that the natural gasoline content of the natural gas is less than five-tenths of a gallon per one thousand cubic feet, Operator agrees to use its best efforts and reserves the right to dispose of such natural gas in the same manner as provided for handling the residue dry gas from the plant or plants.

9. In event any suit is commenced either in law or in equity involving the title to the natural gas of Producer, or to the natural gasoline to which Producer is entitled under this agreement, or to any money to which Producer is entitled, then Operator during the pendency of any such suit may at its option either discontinue the taking of said natural gas until said suit be finally determined or may continue nevertheless to take said natural gas, and shall have the right thereupon to impound any moneys due to Producer to the joint account of Operator and Producer in any national bank in the City of Los Angeles, State of California.

10. Operator shall be entitled to treat at and by means of said plant or plants such quantities of natural gas as it may desire to take from other producers. Operator shall meter separately the natural gas received from Producer and from other

producers whose natural gas is so taken, and at least once a month shall test separately, according to a recognized method for testing gas, samples of natural gas received from Producer and from other producers. The amount of natural gasoline extracted from natural gas delivered by Producer shall be determined as a proportion of the total net natural gasoline extracted at such plant or plants, computed from said meter readings and said tests.

11. It is mutually understood and agreed that Operator shall be entitled to use, free of charge, as much of the residue dry gas remaining after the natural gasoline shall have been extracted as it may require for fuel and power in the operation of its plant. It is understood that "residue dry gas," as referred to in this agreement, is the amount of dry natural gas remaining after deducting from the total amount of natural gas delivered for treatment the amount of natural gas lost or consumed through shrinkage due to the extraction of the natural gasoline contained therein.

Of the residue dry gas remaining after above deductions have been made, Operator agrees to currently return to Producer at the property line nearest to the existing dry gas lines of Operator as much of the residue dry gas as may be necessary for fuel purposes and other producing activities of Producer on the said premises; provided, however, that Operator shall not be obligated to deliver such residue dry gas at a pressure exceeding twenty (20) pounds per square inch at the plant of Operator

making such delivery. It is understood and agreed that Operator may deliver residue dry gas to Producer in excess of the amount of residue dry gas credited to Producer, but in such event Producer hereby agrees to pay Operator for the excess residue dry gas delivered at the current market price of residue dry gas sold or delivered from the plant of Operator making such delivery to Producer; or in event Operator, in order to meet the dry gas requirements of Producer, is required to purchase dry gas in the open market, then Producer agrees to reimburse Operator for the excess dry gas furnished to Producer, at the same price Operator is required to pay for same.

12. In event Producer does not require all of the remaining residue dry gas to be returned to Producer for fuel purposes, then Operator will use its best efforts to sell the balance of the remaining residue dry gas. In event of the sale of such remaining residue dry gas by Operator, Operator shall pay to Producer, on or before the 20th day of the next succeeding calendar month following that in which the sale occurs, fifty per cent (50%) —of the proceeds derived by Operator from the sale of such remaining residue dry gas; provided, however, that in event Operator is unable to sell the remaining residue dry gas, then Operator shall be under no obligation whatsoever to Producer with respect to said remaining residue dry gas.

13. Producer shall at all reasonable times during business hours have access to the accounts and

records of Operator insofar as they pertain to matters arising under this agreement or for the purpose of verifying statements made hereunder.

14. Producer shall be entitled to require Operator to test meters at intervals of at least once each month and oftener in event same is necessary. Producer shall have the privilege if it so desires of having a representative present during all testing of the natural gas or the checking of meters registering the amount of natural gas from the above-described property.

15. Operator agrees to furnish Producer with a report not later than the 20th of each month accounting for the natural gasoline produced and the residue dry gas returned for lease operations or sold. It is agreed that any and all objections to such reports must be made to Operator in writing not later than fifteen (15) days after receipt thereof by Producer; that the failure by Producer to make such objection in writing within said period of fifteen days shall create a conclusive presumption that such report is correct in all particulars, and that after said fifteen-day period shall have elapsed without any such written objection having been made to Operator, Producer shall not thereafter have the right to question or dispute such report in any way.

16. In event at any time or from time to time Operator is required to pay any tax, license or governmental charge, directly or indirectly, upon that part of the natural gasoline manufactured from the natural gas of Producer to which Pro-

ducer is entitled as royalty, or upon the proceeds of the sale of such royalty natural gasoline, Producer shall reimburse Operator for the full amount of such tax, license or governmental charge so paid by Operator.

17. Operator agrees to promptly pay, before the same become delinquent, all taxes which may be assessed or levied during the term of this agreement upon any property erected, placed or maintained by Operator upon any of the lands of Producer hereinabove described. In event Operator fails so to do, Producer may pay any such tax and Operator shall reimburse Producer for all amounts so paid, with interest from the date of such payment at the rate of ten per cent (10%) per annum, upon demand being made therefor.

18. Operator shall not suffer any lien or liens to be filed against the plants, pipelines, machinery and equipment or any other property placed by it upon the lands of Producer, for work, labor, material or supplies furnished in connection therewith, and if any such lien or liens are filed thereon operator agrees to remove the same at its own expense and cost and shall pay any judgments which may be entered thereon or thereunder. Should Operator fail, neglect or refuse so to do, Producer shall have the right to pay any amount required to release any such lien or to defend any action brought thereon and to pay any judgment entered therein, and Operator shall be liable to Producer for all costs, damages and counsel fees and any amounts expended in defend-

ing any proceedings or the payment of any of said liens or any judgment obtained therefor.

19. The nonperformance by either party of its obligations hereunder shall be excused so long and only to the extent that such performance is prevented by strikes, lockouts, delays of transportation companies, interference of governmental authority, or other causes beyond the reasonable control of such party, whether similar or dissimilar to those above stated, or whenever and for so long as such performance is in violation of any governmental order or regulation.

20. It is understood and agreed that in the determining of any question of fact or dispute as to any matter which may arise under this agreement, the same shall be determined by a board of arbitrators to be composed of one member appointed by Producer and one member appointed by Operator, and these two persons shall appoint a disinterested third person, and the decision of the majority of the board of arbitrators shall be binding upon both parties hereto. The decision of the arbitrators shall be a condition precedent to the right of action in this agreement.

21. No provision of this contract shall be interpreted contrary to the rules and regulations of any regulatory body of the United States or of the State of California.

22. The term of this agreement shall be for a period of five (5) years and for so long thereafter

as oil and/or gas shall be produced from the property.

23. In case of default by either party in the performance of its obligations hereunder and the continuance of such default for thirty (30) days after written notice thereof specifying the particulars of the default, the party not in default shall be entitled to terminate or suspend this agreement, and all rights and obligations hereunder shall thereupon cease and determine or be suspended accordingly.

24. Any notices hereunder shall be sent by registered mail, to Operator at 634 South Spring Street, Los Angeles, California, and to Producer at 637 E. Willow Street, City of Signal Hill, County of Los Angeles, California, unless and until either thereof shall change the place of notice by written communication sent to the other by registered mail.

25. This agreement in all of its terms and conditions shall constitute a covenant running with the lands hereinbefore described, and as such shall be binding upon the parties hereto and their respective assigns or successors in interest. Producer covenants and agrees with Operator that in event Producer shall at any time desire to convey, assign or transfer any rights in and to said lands, or any portion thereof, or in, to or under this agreement, to any third party that it will forthwith notify said third party of the terms and conditions of this agreement and require said third party as a part of any transaction involving any such conveyance, assignment or transfer to accept and agree to be bound by each and

all thereof, thereafter submitting documentary evidence of all thereof to Operator.

In Witness Whereof, the parties hereto have caused this instrument to be executed the day and year first hereinabove written.

INCORPORATED
PRODUCTION CO.,

By /s/ G. C. NELSON, and

/s/ L. BROOKS,
"Producer."

BANKLINE OIL COMPANY,

By /s/ J. L. BARNESON,
Vice President; and

/s/ E. J. CASE,
Asst. Secretary,
"Operator."

EXHIBIT No. 2-F

This Agreement, made and entered into this 1st day of January, 1952, by and between Bankline Oil Company, a California corporation, hereinafter designated as "Bankline," first party, and Progressive Oil Company, a Co-partnership of Wayne Mills and Kenneth Mills, hereinafter designated as "Producer," second party;

Witnesseth:

That, Whereas, Producer represents that it has the exclusive right to dispose of the natural gas produced by it from its wells located upon certain lands in the Long Beach oil field, Los Angeles County, California, which lands for the purpose of this agreement are for convenience hereinafter referred to as the "subject premises" and are described as follows:

> Kingsland No. 7 located on Lots No. 16 to No. 20, inclusive, Block 12, Hillside Addition, City of Signal Hill in the County of Los Angeles, State of California.

And, Whereas, Bankline desires to receive from Producer for the purpose of extracting natural gasoline therefrom all of the natural gas which may be produced by Producer from its wells located on the subject premises, and Producer is willing and desires to deliver to Bankline all of the natural gas so produced from said premises during the time this agreement shall be in full force and effect, and hereby warrants its right and title to such natural gas;

Now, Therefore, in consideration of the mutual covenants herein contained and other good and valuable consideration, the receipt of which is hereby acknowledged, the parties hereto covenant and agree with each other as follows:

1. For the purpose of this agreement the follow-

ing words or groups of words when used herein will have the following respective meanings, namely:

Gas—

The term "gas" shall be deemed to mean all gas in its natural state and include as well all gas that may in any way or for any cause flow, arise, or be extracted from the wells on the subject premises, and all condensate collected from gas after the delivery thereof into Bankline's gas gathering system.

Residual Gas—

The term "residual gas" is defined as the amount of dry gas remaining from the total amount of gas delivered to Bankline for processing after deducting therefrom the amount of gas lost through shrinkage due to the extraction of the gasoline content thereof. This shrinkage factor shall, for the purpose of this agreement, be 27 cubic feet of gas for each gallon of gasoline extracted from the gas and 35 cubic feet of gas for each gallon of other liquefiable hydrocarbons extracted from such gas.

Gasoline—

The term "gasoline" is defined as the product commonly known as natural gasoline of the quality currently manufactured at Bankline's Absorption Plant from the gas received from other sources.

Other Liquefiable Hydrocarbons—

The term "other liquefiable hydrocarbons" is defined as propane and butane or mixtures thereof other than natural gasoline which may from time to time be manufactured or extracted in liquid form from the gas received and delivered hereunder.

2. Subject to the terms and conditions hereof, Producer agrees to deliver to Bankline and Bankline agrees to receive from Producer, for the purpose of extracting gasoline therefrom, all of the gas produced from Producer's wells located on the subject premises during the life of this agreement.

3. The delivery of all gas to Bankline hereunder shall be made by Producer at gas traps installed by Producer at or adjacent to the wells for the purpose of separating the gas from the crude oil. Producer agrees to keep the casing heads and connections of all its wells tight and in good condition in order to prevent inleakage of air into the pipeline, and when any well or wells shall be taken out of service for repairs, or for any other purpose, to shut off such wells from the collection or gathering main by suitable stopcocks to be furnished by Bankline. Should there be any inleakage of air occasioned by Producer not maintaining its equipment in proper condition, the gas may be turned to air until the condition causing the inleakage of air shall have been corrected.

Bankline shall have the right to recover all gasoline condensed in the pipelines, sumps, or pipeline traps downstream from the point of measurement and testing, and the condensate so recovered by Bankline shall be considered as a part of the gas delivered to Bankline hereunder and shall be accounted for accordingly. Producer shall provide and install, as required by Bankline, suitable sumps or tanks in which to drain any crude oil collected in the

pipelines through which gas is taken by Bankline from Producer hereunder.

4. Bankline shall furnish, install and maintain, at its own expense, all necessary pipelines and connections from the traps to the plant, as hereinafter provided. Producer hereby grants to Bankline, subject to its rights to do so, the right at all times during the life of this agreement to install required equipment and lines and maintain, repair, renew, replace and/or change the size of all necessary pipelines and other equipment installed by Bankline upon and across the subject premises, and shall at all times during the life of this agreement have full rights of ingress and egress.

Bankline shall indemnify Producer against and hold it harmless from any and all liability for damages to persons or property caused by the operations of Bankline on the subject premises.

5. Bankline shall maintain its plant, pipeline and other facilities in first class condition in order to avoid any unnecessary loss of gas from the time the gas enters the pipeline at the point or points where the gas is delivered to Bankline, and shall operate its plant wherein such gas is processed in an efficient and workmanlike manner consistent with usual and economic plant operations so that a maximum quantity of gasoline of the quality currently manufactured at its said plant will be extracted from the gas delivered to it hereunder.

6. The quantity of gasoline and other liquefiable

hydrocarbons extracted and saved from the gas delivered to Bankline hereunder, which Bankline shall deliver to Producer as royalty, shall be fifty per cent (50%) of the total quantity of gasoline and other liquefiable hydrocarbons so extracted and saved from Producer's gas during each calendar month as determined by the test referred to in Paragraph 7 hereof.

Producer shall have the right within thirty (30) days after giving Bankline notice of its intention to take payment of its royalty in money or in kind. An option once exercised to take such royalty either in money or in kind shall not be changed for at least thirty (30) days unless such change is agreed to by both of the parties hereto.

Producer shall be entitled to ten (10) days' free storage of its royalty gasoline and other liquefiable hydrocarbons in tanks provided by Bankline, provided, however, that such storage shall be at Producer's risk as to all loss by evaporation, fire and/or other causes beyond the reasonable control of Bankline. Delivery of Producer's royalty gasoline and other liquefiable hydrocarbons shall be made at the plant where produced or at some other point mutually agreeable to the parties hereto.

Deliveries of gasoline by Bankline to Producer hereunder shall be made, at Producer's option, either into tank trucks or pipelines installed and maintained by Producer. In the event the gasoline is loaded into tank trucks, the number of gallons delivered shall be computed on the basis of the number of gallons gauged in such tank trucks at time of

loading. In the event the gasoline is delivered into pipeline, the number of gallons so delivered to Producer shall be computed on the basis of the number of gallons metered from Bankline's tanks from which such shipments are made. All such measurements of gasoline shall be corrected to a temperature of 60° Fahrenheit. All samples for determining the quality of the gasoline delivered by one party to the other hereunder shall be taken from the trucks into which such deliveries are made or from the tanks from which pipeline shipments are made, depending upon the method of delivery.

In the event Bankline is not given notice of Producer's intention to take its royalty interest in kind, it shall be deemed that Producer desires to receive its royalty interest in money, and Bankline agrees to pay Producer a proportion of the total gross proceeds received by Bankline from the sale at its plant of the gasoline and other liquefiable hydrocarbons extracted by it from the gas delivered to it by Producer hereunder calculated at the hereinabove specified royalty rate.

If Producer shall not elect to take its royalty production in kind, and if in such event the gasoline extracted from the gas delivered and received hereunder is not sold by Bankline to third parties, then Bankline agrees to purchase Producer's said royalty share of such gasoline at the Standard Oil Company's posted price in the Long Beach oil field for gasoline of like Reid vapor pressure as the gasoline

extracted by Bankline at its said plant during the same calendar month.

Royalty payments shall be made by Bankline to Producer on or before the 20th day of the calendar month next succeeding the month in which the gasoline is produced.

7. Bankline shall be entitled to process at and by means of its plant such quantites of gas as it may desire to take from operators other than Producer, provided, however, that in such event Bankline shall meter separately the gas received from Producer and from such other operators whose gas is so processed. As often as Bankline deems necessary, it shall test separately samples of gas received from Producer and from other operators whose gas is so received by Bankline, in accordance with the methods specified in California Natural Gasoline Association Bulletin No. TS-351, or revisions thereof. The natural gasoline content shall be determined by the rectified test, and the other hydrocarbon contents shall be determined by the difference between the 30#-32° F test and the rectified test or any other method which shall be mutually agreed upon by Producer and Bankline.

For the purpose of determining the royalty to which Producer shall be entitled hereunder, it is agreed that the amount of gasoline and other liquefiable hydrocarbons extracted and saved from Producer's gas during each calendar month shall be a proportionate share of all of the gasoline and other liquefiable hydrocarbons produced and saved by

Bankline at its Absorption Plant during said month. Said proportion shall bear the same relation to the total quantity of gasoline and other liquefiable hydrocarbons produced at said plant as the computed quantity of gasoline and other liquefiable hydrocarbons contained in Producer's gas bears to the computed quantity of gasoline and other liquefiable hydrocarbons contained in all of the gas processed by Bankline during the same calendar month as determined from the meter readings and the tests herein mentioned. The aforesaid tests to determine the gasoline content of the gas delivered hereunder shall be made at a point as near the meter as is practicable.

Bankline shall not be obligated to extract or manufacture from the gas delivered to it hereunder any liquefiable hydrocarbons other than the product commonly known as natural gasoline until such time as in its exclusive judgment the amount of such liquefiable hydrocarbons available for manufacture from the gas of Producer and of third parties which is processed in its plant can be disposed of in such quantities and at such prices as will justify the installation of the equipment and facilities necessary for their manufacture.

Producer shall be given at least twenty-four (24) hours' notice, written if demanded, of the time tests of the gas are to be made for determining the gasoline content thereof and/or the time the meters measuring the gas are to be inspected, calibrated, or adjusted, and shall be entitled to representation at

all such times. The representative of Producer shall have full voice with the representative of Bankline as to the establishment of the gasoline content and the accuracy of the meter or meters measuring the gas received and delivered hereunder.

8. Bankline shall not be obligated to process the gas produced from Producer's wells on the subject premises for the extraction of the gasoline content thereof during such time as the average recoverable gasoline content of said gas is less than one-half gallon of 20.3-pound Reid Vapor pressure gasoline per each thousand cubic feet of gas, determined in the manner specified in California Natural Gasoline Association Bulletin No. TS-351, or revisions thereof. In the event the average recoverable gasoline content of the gas shall be less than one-half gallon of 20.3-pound Reid Vapor pressure gasoline per one thousand cubic feet of gas, at the option of Bankline all such gas may be handled and accounted for in the same manner as the residual gas available for delivery at the outlet of the plant, and in this event the gas shall be delivered to Bankline and marketed by Bankline under the same terms and conditions provided for the handling of and accounting for residual gas available for delivery to Producer or sale as specified in paragraph 9 hereof.

Bankline shall not be required to accept, process or handle the gas produced from any well or group of wells supplying gas to Bankline as a unit through one meter connection during such time as the total gas production from such well or group of wells is

less than an average of fifty thousand (50,000) cubic feet per day; provided, however, that Bankline may accept, process or handle such gas if it so desires, but its election to do so shall not bind it to continue to accept, process or handle such gas. Bankline shall not be required to accept from Producer hereunder any gas containing hydrogen sulphide in excess of five (5) grains per each one hundred (100) cubic feet of gas as determined by Tutweiler Test. Producer shall be entitled to make such other disposition as it may desire of the gas so rejected by Bankline in accordance with the terms of this provision. The suspension of operation by Bankline under such conditions shall not terminate or impair any of its right under this agreement with respect to other gas of Producer which is available to Bankline hereunder.

9. After the gas delivered and received hereunder shall have been processed for the extraction of the gasoline therefrom, Bankline shall be entitled to use, free of charge, such quantities of the residual gas as may be reasonably required for fuel purposes in connection with the operation of its plant; provided that the total volume of residual gas used by Bankline for fuel purposes in its plant shall be prorated among all of the operators delivering gas to Bankline's plant for processing on the basis of the total volume of gas delivered by each of said operators.

Bankline agrees to deliver to Producer for lease fuel, all of the residual gas it may need up to the total amount of residual gas remaining after deduc-

tions have been made for shrinkage and plant fuel as hereinabove provided. The delivery of such dry gas to Producer shall be made to such lease described in this agreement as Producer may designate at a pressure of not less than five (5) pounds per square inch nor more than forty-five (45) pounds per square inch at the point of delivery.

Bankline agrees to use its best efforts to sell all of Producer's share of such residual gas as is not required by Producer at the highest price it can obtain and to pay Producer fifty per cent (50%) of the total gross proceeds derived by Bankline from the sale of such gas, provided, however, that in the event all of the residual gas available for sale at the plant shall not be sold, Bankline shall prorate the total quantity of residual gas that is sold at such plant by Bankline to the various operators delivering gas to the plant for processing proportionally according to the respective amounts of residual gas available for sale by each operator.

Bankline shall not be required to store residual gas for future delivery to Producer.

Royalty payments covering the proceeds from the sale of residual gas shall be made by Bankline to Producer on or before the 20th day of the calendar month next succeeding that month in which the residual gas is sold.

10. Producer shall at all reasonable times during business hours have the right to inspect the records and accounts of Bankline relating to the production

of gasoline and other liquefiable hydrocarbons in the plant wherein Producer's gas is processed hereunder for the purpose of determining the amount of gasoline and other liquefiable hydrocarbons produced, and the amount of residual gas sold and the selling price thereof, if any be sold.

11. Bankline agrees to furnish Producer with a report not later than the tenth (10th) day of each calendar month accounting for all gas received, gasoline and other liquefiable hydrocarbons produced, residual gas delivered to Producer, and residual gas sold during the preceding calendar month and such other pertinent data as Producer may require to enable it to determine the accuracy of Bankline's calculations.

12. Bankline agrees to take all gas which may be produced from Producer's wells on the subject premises and tendered to it by Producer at whatever pressure may be available at the outlet of Producer's gas traps or separators, provided, such gas traps and separators are installed and maintained by Producer in accordance with the provisions of paragraph 13 hereof. Producer warrants that it has the title to all gas delivered to Bankline hereunder.

Bankline shall not be accountable to Producer for any of Producer's gas which it is unable to process and/or conserve at its plant during the periods of peak production of any of Producer's wells. During the time or times when the total amount of gas available for processing in Bankline's plant from all sources is in excess of the capacity of Bankline's said plant, Bankline's obligation to process Produc-

er's gas hereunder shall be limited as follows: The plant capacity shall be allocated to the processing of gas available to Bankline for processing from Producer hereunder and all other operators in the Long Beach field in the same proportion that the total amount of gas so available from each of such other operators bears to the total amount of gas available from all of such operators.

13. Producer shall install and maintain at its sole expense all gas traps or oil and gas separators which are necessary and proper for efficiently separating the oil and gas produced by Producer on the subject premises in order to save and render available all of such gas for delivery to Bankline. Bankline shall have the right to inspect such equipment at all reasonable times.

Producer shall install at ground elevation all of the connections and other apparatus necessary for the delivery of the gas from its gas traps into Bankline's wet gas gathering system, including the regulators and other facilities necessary for maintaining the proper back pressure on the gas produced from Producer's wells on the subject premises and available for delivery to Bankline at such points.

14. Bankline shall install and maintain at its sole cost and expense a meter of standard make and design capable of accurately measuring all of the gas delivered and received hereunder from Producer's wells, it being understood that Bankline shall not be required to install meters for measuring separately the gas produced from each of Producer's wells located on the subject premises.

All measurement of gas delivered and received hereunder shall be computed in cubic feet based on an absolute pressure of 14.73 pounds per square inch at a temperature of 60° Fahrenheit, in accordance with the procedure outlined in California Natural Gasoline Association Bulletin No. TS-353, or revisions thereof.

15. In the event that at any time or from time to time Bankline is required to pay any processing tax, or any other tax, license, or governmental charge, directly or indirectly, upon or measured by the gasoline and/or other liquefiable hydrocarbons manufactured from the gas of Producer which Producer receives as royalty, or the gasoline taken by it in exchange therefor, or upon the proceeds of the sale of such royalty gasoline or other liquefiable hydrocarbons, the manufacture thereof, or upon the production or transportation of the gas processed hereunder, or upon the dry gas delivered to Producer hereunder, or upon the proceeds of the sale of any dry gas to which Producer is entitled, Producer agrees to reimburse Bankline for the full amount of such processing tax, and/or any other tax, license or governmental charge paid by Bankline on or measured by Producer's share of such dry gas and/or gasoline and other liquefiable hydrocarbons. In the event Bankline is required to pay any severance or production tax on any gas or gasoline delivered by Producer to Bankline, or any tax which is measured or allocated on production or severance of such gas and/or gasoline, Producer agrees to reimburse Bankline for the full amount of such severance or

production tax, it being stipulated between the parties that the full incidence of such severance or production tax, regardless of the manner of levy or collection, shall be upon Producer.

16. Bankline agrees to pay promptly, before they become delinquent, all taxes which may be assessed or levied during the term of this agreement upon any property erected, placed and maintained by Bankline upon the subject premises. In the event Bankline fails so to do, Producer may pay any such tax and Bankline shall reimburse Producer for all amounts so paid, with interest from the date of such payment at the rate of seven per cent (7%) per annum, upon demand being made therefor.

17. Bankline shall not suffer any lien or liens to be filed against the plant, pipelines, machinery and/or equipment, or any other property placed by Bankline upon the subject premises for work, labor, materials or supplies furnished in connection therewith, and if any such lien or liens are filed thereon, Bankline agrees to remove the lien or liens at its own expense and cost and shall pay any and all judgments which may be entered thereon or thereunder. Should Bankline fail, neglect, or refuse so to do, Producer shall have the right to pay any amount required to release any such lien or liens or to defend any action brought thereon, and to pay any judgment therein, and Bankline shall be liable to Producer for all costs, counsel fees, and any amounts expended in defending any proceeding or the payment of any of the liens or any judgment obtained therefor.

18. In the event of default on the part of either party to this agreement in the performance of its obligations under this agreement, and such default shall not be remedied by the party in default within ten (10) days after receiving written notice thereof specifying the particulars of the default, then the party giving such written notice shall have the right to terminate or suspend this agreement, and thereupon all rights and obligations shall cease and determine or be suspended accordingly.

19. Bankline shall be entitled to remove, from time to time and within a reasonable time after the termination of this agreement, all pipelines, connections, meters and other equipment heretofore or hereafter installed by it on the subject premises. Bankline agrees to remove all of the pipelines, connections, meters, pumps, and other equipment installed by Bankline upon the property of Producer within ten (10) days after receiving notice from Producer of Producer's intention to quitclaim its interest in such property.

20. All notices from Producer to Bankline may be sent by United States mail, postage prepaid, addressed to Bankline Oil Company, 437 South Hill Street, Los Angeles 13, California. All notices from Bankline to Producer may likewise be sent by United States mail, postage prepaid, addressed to Progressive Oil Company, 2551 Cherry Avenue, Long Beach 6, California. Either party may change its mailing address to any other point within the State of California.

21. The nonperformance by either party of its obligations hereunder shall be excused so long as such performance is prevented by accidents, fires, riots, strikes, lockouts and other labor disturbances, earthquakes, war, acts of God, acts of any government (whether foreign or domestic, federal, state, county or municipal), total or partial failure of transportation or delivery facilities or supplies, or any cause beyond the reasonable control of such party, whether similar to the foregoing causes or not. If this contract, the performance thereof, or any matter or thing connected therewith, be in conflict with any law, ordinance or regulation, whether of federal, state, or of lesser political subdivision, then the performance thereof may be discontinued while so in conflict therewith.

22. This agreement shall become effective as of the date hereof and, except as hereinbefore provided, shall remain in full force and effect for a period of five (5) years and thereafter for so long as Producer operates aforesaid properties or either or any of them.

23. This agreement shall continue in force and be binding upon the parties hereto, their successors and assigns, for and during the term and period of this agreement, and Bankline shall be free from time to time, as it may elect, to turn over gas received hereunder to another operator or plant for processing, in which event all of the provisions hereof shall continue to apply in like manner as though Bankline processed such gas in its plant.

In Witness Whereof, the parties hereto have executed this instrument in duplicate by their proper officers, who are thereunto duly authorized, on the day and year first above written.

BANKLINE OIL COMPANY,

By /s/ L. L. AUBERT,
President; and

/s/ LUCILLE LYLE,
Assistant Secretary.

PROGRESSIVE OIL
COMPANY,

A Co-partnership of Wayne Mills and Kenneth Mills;

By /s/ WAYNE MILLS, and
KENNETH MILLS.

EXHIBIT No. 2-G

This Agreement, made and entered into this 15th day of March, 1934, by and between Bankline Oil Company, a California corporation, hereinafter designated as "Operator," and William C. McDuffie, as Receiver of Richfield Oil Company of California, hereinafter designated as "Producer,"

Witnesseth:

That Whereas, Producer is the owner and/or lessee of those certain parcels of land situated in

the Signal Hill oil district, Los Angeles County, California, described as

> Lots Three to Nine (3 to 9), Sixteen to Twenty (16 to 20), Twenty-five to Twenty-nine (25 to 29), Thirty-five to Forty-eight (35 to 48), all inclusive, in Block Twelve (12), Hillside Addition;

and Whereas, Producer is the owner and/or lessee of the above described premises and is the owner of the natural gas produced therefrom and hereby guarantees his right and title to same; and

Whereas, Operator has erected and is operating a plant or plants in the Signal Hill oil field for the purpose of treating gas for the extraction of gasoline therefrom; and

Whereas, Operator in order to augment its supply of gas for said plant or plants, desires to purchase and/or receive from Producer all of the gas which my be produced by Producer from the property above described, and Producer is willing and desires to sell and/or deliver to Operator all of the gas produced by Producer from the above-described property and hereby guarantees his right and title to same:

Now, Therefore, in consideration of the premises and of the covenants, agreements and payments hereinafter set forth and other valuable considerations, the receipt of which is hereby acknowledged, the parties hereto covenant and agree with each other as follows:

1. Producer hereby agrees to furnish and deliver to Operator and Operator agrees to take and utilize in its plant or plants, subject to the terms and conditions of this agreement, natural gas produced from the above-described property during the life of this agreement except as provided in paragraphs seven, eight and nine hereof.

2. All gasoline condensed in the lines, pumps or traps of said Producer shall be considered as a part of the gas to be delivered to Operator and shall be accounted for by Operator as gasoline extracted from said gas.

3. Operator is granted the exclusive right to treat gas produced from the above-described property for and during the period of this agreement.

4 Producer shall deliver the gas at the casing heads and/or at gas traps installed by Producer on the premises above described. Producer agrees to use his best efforts to prevent the inleakage of air in traps or lines. Operator shall furnish, install and maintain all pipelines and connections from casing heads or traps to its plant or plants and such meters as may be necessary for the accurate measurement of the gas received from the property.

5. Producer, insofar as it has the right to do so, shall furnish right-of-ways for such pipe-lines and connections on the property. Producer hereby grants to Operator a right-of-way for his employees and vehicles over and across the lands of Producer here-

inabove described for any and all purposes necessary or proper in connection with the business of Operator insofar as it pertains to the functions to be performed by Operator under the terms of this agreement. Operator shall be entitled to remove, within a reasonable time after the termination of this agreement, all pipe-lines, connections, meters and other equipment installed by it.

6. Operator agrees to pay to Producer as royalty fifty per cent (50%) of the proceeds derived from the sale of gasoline extracted from said gas, or at Producer's option, as hereinafter provided, to deliver to Producer as royalty fifty per cent (50%) of the gasoline extracted from said gas.

Producer shall have the right to take his royalty gasoline in kind if he so desires, provided that he shall in such event serve Operator with thirty (30) days' advance notice in writing of such intention. An option once exercised to take such royalty either in cash or in kind shall not be changed for at least six (6) months unless agreed to by both parties hereto.

In event royalty gasoline shall be paid in kind, Operator shall provide ten (10) days' free storage of the royalty gasoline belonging to Producer in tanks provided by Operator; provided, however, that such storage shall be at Producer's risk as to all loss by evaporation, fire and/or other causes beyond the reasonable control of Operator.

In event Producer fails to remove said royalty

gasoline from the tanks of Operator within the said ten-day period, Operator shall not be obligated to deliver said royalty gasoline to Producer except at such times and in such quantities as will not interfere with the sales and/or deliveries of gasoline which Operator is otherwise required to make from said plant.

Royalty payments shall be made by Operator to Producer on or before the 20th day of each calendar month next succeeding that in which the gasoline is produced.

7. It is understood that Producer is operating his property primarily for oil production and Operator agrees to handle the gas produced from Producer's property at pressures which in the opinion of Producer will not interfere with the production of oil from the leases. It is understood and agreed by and between the parties hereto that during the period of flush production or in event Producer insists on maintaining extremely low pressures on casing heads or gas traps, Operator shall not be obligated to take, treat or pay for gas produced and/or vented during such periods.

In event that the amount of gas produced from the properties of Producer, together with the amount of gas produced from properties of other producers with whom Operator has contracts for the treatment of gas, exceeds the capacity of the plant of Operator and said excess quantity is not sufficiently permanent in the judgment of Operator

to justify the construction of additional plant capacity, then during the period of said excess production the amount of gas of Producer treated in said plant shall be such pro rata of Producer's gas as the total amount of gas available from all producers bears to the amount of gas which can be treated.

Operator shall not be obligated to treat gas hereunder when the quantity of gas produced is so small as to render the treatment of same unprofitable to Operator.

Producer agrees not to treat or cool gas produced on the above-described property in any manner that will cause the gasoline or a portion of the gasoline to be condensed or separated from the natural gas. Producer agrees to maintain the casing heads of all wells and all their connections thereon tight and in good condition to prevent an inleakage of air into the pipe-lines of Operator. In the event of an inleakage of air into the pipe-lines of Operator, occasioned by the failure on the part of Producer to maintain his equipment in proper condition, Operator, at its option, may correct the volume of gas received from the above-described property for any such inleakage of air by the application of a factor based on the percentage of air contained in said gas.

8. Operator shall not be obligated to utilize any gas in its plant or plants which contains less than five-tenths (5/10) of a gallon of gasoline per one

thousand (1,000) cubic feet of gas unless Operator so desires. In the event Operator shall refuse or neglect to take and utilize in its plant or plants any gas available on the above-described property for the reason that the gasoline content of the gas is less than five-tenths of a gallon per one thousand cubic feet, Operator agrees to use its best efforts and reserves the right to dispose of such gas in the same manner as provided for handling the residue dry gas from the plant or plants.

9. In event any suit is commenced either in law or in equity involving the title to the gas of Producer, or to the gasoline to which Producer is entitled under this agreement, or to any money to which Producer is entitled, then Operator during the pendency of any such suit may at its option either discontinue the taking of said gas until said suit be finally determined or may continue nevertheless to take said gas, and shall have the right thereupon to impound any moneys due to Producer to the joint account of Operator and Producer in any national bank in the City of Los Angeles, State of California.

10. Operator shall be entitled to treat at and by means of said plant or plants such quantities of gas as it may desire to take from other producers. Operator shall meter separately the gas received from Producer and from other producers whose gas is so taken and at least once a month shall test separately, according to a recognized method for

testing gas, samples of gas received from Producer and from other producers.

11. The amount of gasoline extracted from gas delivered by Producer when mixed or commingled with other gas shall be such proportion of all the gasoline produced and saved from said mixed or commingled gas as the computed gasoline in Producer's gas bears to the computed gasoline in all of said mixed or commingled gas as determined from the meter readings and tests hereinabove mentioned. The volume of dry gas to be credited to Producer shall bear the same proportion to the total volume of dry gas discharged from said plant or plants as the volume of gas received from Producer bears to the total volume of gas received by Operator from all sources at said plant.

Operator shall not be held accountable for so much of the dry gas at any plant or plants as may be actually or reasonably used or consumed or lost in the operation of said plant or plants and in the production of gasoline from the natural gas.

Of the dry gas remaining after above deductions have been made, Operator agrees to currently return to Producer at the property line nearest to the existing dry gas lines of Operator as much of the residue dry gas as may be necessary for fuel purposes and other producing activities of Producer on the said premises; provided, however, that Operator shall not be obligated to deliver such gas at a pressure exceeding twenty pounds per square inch at

the plant of Operator making such delivery. It is understood and agreed that Operator, to meet Producer's requirements, may deliver dry gas to Producer in excess of the amount of residue dry gas credited to Producer, but in such event Producer hereby agrees to pay Operator for the excess dry gas delivered at the current market price of residue dry gas sold or delivered from the plant of Operator making such delivery to Producer; or in event Operator, in order to meet the dry gas requirements of Producer, is required to purchase dry gas in the open market, then in this event Producer agrees to reimburse Operator for the excess dry gas furnished to Producer, at the same price Operator is required to pay for same.

12. In event Producer does not require all of the gas to be returned for the above-mentioned purposes, then Operator will use its best efforts to sell the balance of the dry gas. In event of the sale of such residue dry gas by Operator, Operator shall pay to Producer on or before the 20th day of the next succeeding calendar month following that in which the sale occurs, fifty per cent (50%) of the proceeds derived by Operator from the sale of such residue dry gas; provided, however, that in event Operator is not able to sell the resulting dry gas or for any other reason fails and/or neglects to sell the resulting dry gas, then in such an event Operator shall be under no obligations whatsoever to Producer with respect to said dry gas.

13. Producer shall at all reasonable times during business hours have access to the accounts and

records of Operator insofar as they pertain to matters arising under this agreement or for the purpose of verifying statements made hereunder.

14. Producer shall be entitled to require Operator to test meters at intervals of at least once each month and oftener in event same is necessary. Producer shall have the privilege, if he so desires, of having a representative present during all testing of the gas or the checking of meters registering the gas from the above described property.

15. Operator agrees to furnish Producer with a report not later than the 20th of each month accounting for the gasoline produced and the dry gas returned for lease operations or sold. It is agreed that any and all objections to such reports must be made to Operator in writing not later than fifteen (15) days after receipt thereof by Producer; that the failure by Producer to make such objection in writing within said period of fifteen days shall create a conclusive presumption that such report is correct in all particulars and that after said fifteen-day period shall have elapsed without any such written objection having been made to Operator, Producer shall not thereafter have the right to question or dispute such report in any way.

16. In event at any time or from time to time Operator is required to pay any tax, license or governmental charge on the manufacture, transportation or sale upon that part of the gasoline manufactured from the gas of Producer to which Producer is entitled as royalty or upon the proceeds

of the sale of such royalty gasoline, Producer shall reimburse Operator for the full amount of such tax, license or governmental charge so paid by Operator.

17. Operator agrees to promptly pay, before the same become delinquent, all taxes which may be assessed or levied during the term of this agreement upon any property erected, placed or maintained by Operator upon any of the lands of Producer hereinabove described. In event that Operator fails so to do, Producer may pay any such tax and Operator shall reimburse Producer for all amounts so paid, with interest from the date of such payment at the rate of ten (10) per cent per annum, upon demand being made therefor.

18. Operator shall not suffer any lien or liens to be filed against the plants, pipelines, machinery and equipment or any other property placed by it upon the lands of Producer, for work, labor, material or supplies furnished in connection therewith, and if any such lien or liens is filed thereon Operator agrees to remove the same at its own expense and cost and shall pay any judgments which may be entered thereon or thereunder. Should Operator fail, neglect or refuse so to do, Producer shall have the right to pay any amount required to release any such lien or to defend any action brought thereon and to pay any judgment entered therein, and Operator shall be liable to Producer for all costs, damages and counsel fees and any amounts expended in defending any proceedings

or the payment of any of said liens or any judgment obtained therefor.

19. The non-performance by either party of its obligations hereunder shall be excused so long and only to the extent that such performance is prevented by strikes, delays of transportation companies or other causes beyond the reasonable control of such party, whether similar or dissimilar to those above stated.

20. It is understood and agreed that in the determining of any question of fact or dispute as to any matter which may arise under this contract, the same shall be determined by a board of arbitrators to be composed of one member appointed by Producer and one member appointed by Operator and these two persons shall appoint a disinterested third person, and the decision of the majority of the board of arbitrators shall be binding upon both parties hereto. The decision of the arbitrators shall be a condition precedent to the right of action in this contract.

21. No provision of this contract shall be interpreted contrary to the rules and regulations of any regulatory body of the United States or of the State of California.

22. The term of this agreement shall be for a period of five (5) years from and after the date hereof and so long thereafter as gas may be produced in paying quantities from the above-described property.

23. In case of default by either party in the performance of its obligations hereunder and the continuance of such default for thirty (30) days after written notice thereof specifying the particulars of the default, the party not in default shall be entitled to terminate or suspend this agreement and all rights and obligations hereunder shall thereupon cease and determine or be suspended accordingly.

24. All notices from Producer to Operator shall be sent by United States mail, postage prepaid, addressed to Bankline Oil Company, 634 South Spring Street, Los Angeles, California. All notices from Operator to Producer shall be likewise sent by United States mail, postage prepaid, addressed to William C. McDuffie, Receiver of Richfield Oil Company of California, 555 South Flower Street, Los Angeles, California. Either party may change its mailing address to any other point within the State of California.

25. This agreement shall continue in force and be binding upon the parties hereto, their heirs, executors, administrators, successors and/or assigns for and during the terms and period of this agreement.

26. Notwithstanding anything to the contrary herein contained, it is understood by both parties hereto that this agreement is subject to the lien, operation and effect of that certain Trust Indenture dated May 1, 1929, by Richfield Oil Company of

California to Security-First National Bank of Los Angeles, Trustee.

27. William C. McDuffie as Receiver of Richfield Oil Company of California executes this agreement solely in his capacity as Receiver of Richfield Oil Company of Califoria and without any personal obligations and liabilities whatever, and shall be bound by and liable upon the terms hereof for so long only as he shall continue to operate as Receiver thereof the properties of Richfield Oil Company of California. Upon acceptance by any person, firm or corporation acquiring a major portion of the assets of Richfield Oil Company of California by virtue of any plan of reorganization or foreclosure effected in its receivership of the duties, obligations and liabilities of the said Receiver of Richfield Oil Company of California hereunder, such person, firm or corporation shall succeed to all of the rights, powers, privileges and immunities of the said Receiver hereunder.

In witness whereof, the parties hereto have hereunto set their signatures and seals the day and year first above written.

BANKLINE OIL COMPANY,

By /s/ K. J. BARNESON,
Vice President; and

/s/ E. J. CASE,
Asst. Secretary,
"Operator."

WILLIAM C. McDUFFIE, as
Receiver for Richfield Oil
Company of California,

By /s/ R. C. MONTGOMERY,
"Producer."

EXHIBIT NO. 2-H

This Agreement, made and entered into this 25th day of May, 1925, by and between The Superior Oil Company, a corporation, duly organized and existing under and by virtue of the laws of the State of California, hereinafter designated as "Producer," and Bankline Oil Company, California corporation, hereinafter designated as "Bankline,"

Witnesseth:

That whereas, the Producer is the lessee of the hereinafter described premises, under an oil and gas lease from Robt. H. Britton, Mattie E. Britton, et al., as lessor, dated March 28, 1922, and recorded in Book 1134, of ....., at page 238 thereof, records of Los Angeles County, California; and,

Whereas, Bankline has erected a plant in the Signal Hill District, in said County of Los Angeles, capable of handling and treating gas for the extraction of gasoline therefrom; and,

Whereas, the Bankline, in order to augment its supply of gas for said plant, desires to purchase

and receive from said Producer all of the natural gas (except such gas as may be required in the development and operation of the property), which may be produced from the property hereinafter described, for the purpose of manufacturing and extracting gasoline therefrom;

Now, therefore, in consideration of the mutual covenants herein contained, and other good and valuable consideration, the receipt of which is hereby acknowledged, the parties hereto covenant and agree with each other as follows, to-wit:

1. The Producer hereby agrees to furnish and deliver to the Bankline, for the purpose of manufacturing and extracting gasoline therefrom, all of the gas produced on the lease (except such gas as may be required in the development and operation of the property, which it is understood may be retained by Producer if he so desires) for and during the entire period of time that gas shall be produced therefrom, the said Bankline being given the exclusive right to treat all gas produced as aforesaid.

2. The Producer shall deliver the gas at an approved gas-trap, to be installed and maintained by the Producer at a central point on the premises hereinafter described, and Bankline agrees to carry such vacuum or pressure at this point as Producer shall from time to time deem advisable. Bankline shall furnish, install and maintain necessary pipe connections from said gas trap to said plant, and necessary meter or meters for the measurement of

gas delivered from said premises. The Producer shall furnish right of way for said pipe lines and connections on the premises hereinafter described, and the Bankline elsewhere. The Bankline shall be entitled to remove on termination of this agreement all pipe connections, meters and other equipment installed by it.

3. In full consideration of the rights herein granted the Bankline agrees to pay to Producer one-third (33⅓%) of the gross proceeds received by it from the sales of gasoline manufactured or extracted from said gas. Bankline shall have the right to sell royalty gasoline with its own share of the product and continue to do so if no election be made by the Producer to take his royalty gasoline in kind. Producer shall have the right to take his royalty gasoline in kind, provided he shall in such event serve Bankline with thirty days' advance notice in writing of such intention, and such election to take royalty gasoline in kind shall be exercised not oftener than once in every six calendar months.

In the event royalty gasoline be paid in kind, Producer shall be entitled to thirty days free storage of his royalty gasoline in tanks provided by Bankline, provided that such storage shall be at Producer's sole risk as to loss by evaporation, fire, or any other cause.

4. Royalty payments shall be made by Bankline to Producer on or before the 20th day of the

calendar month next succeeding that in which gasoline is produced.

5. The Producer shall have at all reasonable times during business hours, the right to inspect the records and accounts of the Bankline relating to the production of gasoline from said plant or plants. Bankline shall keep accurate records and furnish the Producer with a statement thereof, showing the amount of gas taken from the Producer's property, the gasoline content thereof as indicated by the tests hereinafter provided for, and full records of the amount of gas handled in said plant or plants, the quantity of gasoline produced and sold, and the prices received therefor, the amount of gas consumed for fuel, and the amount of dry gas sold (if any be sold). Bankline shall have the right to use such gas for fuel out of the gas furnished by Producer as it may require in the operation of said plant or plants in which Producer's gas is utilized. The amount of gas wasted or used for fuel shall be apportioned against the various producers on the basis of the quantities delivered to the plant.

6. Bankline shall be entitled to refine, at and by means of said plant or plants, such quantities of gas as it may desire to take from other persons than Producer. Bankline shall meter separately the gas received from Producer and from other producers whose gas is so taken, and at least once a month shall test separately, according to a recognized method for testing gas, samples of gas received

from Producer and from such other producers. The amount of gasoline extracted from gas delivered by Producer shall be determined as a proportion of the total gasoline extracted at said plant, computed from said meter readings and said tests. The Producer shall be entitled to require Bankline to test meters at intervals of not less than one month on reasonable notice.

7. Bankline agrees to maintain sufficient vacuum in its lines at all times to handle all gas produced on the lease or leases, but may elect not to receive any gas from Producer which does not contain gasoline in commercial quantities. Any gas tendered to Bankline under this agreement and rejected by them may be disposed of elsewhere by Producer.

8. Bankline agrees to use its best efforts to sell the dry gas remaining after gasoline content has been extracted, and in event of sale thereof it shall account to Producer, on the 20th day of the next calendar month following that in which sale occurs, on the basis, as to quantity, of at least seventy-five per cent (75%) of the volume of wet gas delivered to it by Producer. Bankline agrees to pay to Producer for all dry gas sold the entire gross proceeds of such sale, less the actual cost of compressing and marketing the same, in any event not to exceed four cents (4c) per M. cubic feet. In the event Producer elects to have dry gas returned to him, the same shall be returned at a pressure of at least 25 pounds per square inch at the plant, but all expense of redelivery shall be borne by him. For the purpose of

allowing for loss and fuel used in Bankline's plant and lines there shall be no obligation on the part of Bankline to deliver dry gas to Producer in excess of seventy-five per cent (75%) of the volume of wet gas received by Bankline from Producer. In the event that the Producer does not elect to take such dry gas to which it is entitled at the Bankline plant, and such gas be not sold, then Bankline shall be under no obligations whatsoever to Producer as to such dry gas.

9. The property affected by this agreement is located in Los Angeles County, California, and particularly described as follows:

> Lots Eighteen and Nineteen, Block forty-eight (48), East one-half (E½) of Lot Eighteen (18) and West one-half (W½) of Lot Seventeen (17) of Block Forty-three (43), Peck & Anderson Tract, Los Angeles County, as per map recorded in Book 4, Page 11, containing 3 acres. Lots one (1), Two (2), Three (3), Four (4) and Five (5), Block Forty-three (43); P. & A. Tract, containing 5 acres.
>
> East one-half (E½) Lot seventeen (17) and Lot Sixteen (16), Block Forty-three (43) P. & A. Tract, containing 1½ acres.

10. The performance by either party of his or its obligations hereunder shall be excused so long as and to the extent that such performance is prevented by strikes, lockouts, delays of transportation companies, inability to obtain necessary labor or ma-

terial in the open market, or other causes beyond the reasonable control of such party.

11. In the event of any dispute as to any matter arising out of this agreement, such dispute shall be submitted to arbitration. Each of the parties hereto shall select one arbitrator and the two so selected shall select a third, and a decision by any two of such arbitrators shall be binding and conclusive upon the parties hereto.

12. In case of default by either party in the performance of his or its obligations hereunder, and the continuance of such default for thirty (30) days after written notice thereof, specifying the particulars of the default, the party not in default shall be entitled to terminate this agreement, and all rights and obligations hereunder shall thereupon cease and determine except as to the payment to the Producer of any money which may be due to it from the Bankline.

13. All notices from the Producer to the Bankline hereunder shall be sent by United States mail, postage prepaid, addressed to the Bankline at 310 Sansome Street, San Francisco, California. All notices from the Bankline to the Producer shall be likewise sent by United States mail, postage prepaid, addressed to the Producer at 1203 A. G. Bartlett Building, Los Angeles, California.

This agreement shall be binding upon and inure to the benefit of the heirs, successors and assigns of the respective parties hereto.

Executed in duplicate the day and year first hereinabove written.

THE SUPERIOR OIL COMPANY,

By /s/ W. M. KECK,
Pres., and

/s/ F. D. SOUTH,
Asst. Secy.

BANKLINE OIL COMPANY,

By ....., and
.....

We, the undersigned, lessors in that certain lease above mentioned (or present owners of the property above described or having an interest in the royalties or production therefrom) do hereby join in the foregoing contract insofar as our royalty gas, if any, is concerned; all payments to us to be made to ..... Such payments shall relieve Bankline Oil Company from seeing to the proper distribution thereof.

Dated: ....., 1925.

.....,

.....

EXHIBIT No. 3

Copy

Signal Oil and Gas Company
General Offices, 811 West Seventh Street
Los Angeles 17, California

October 29, 1952.

Bankline Oil Company,
437 South Hill Street,
Los Angeles, California.

Gentlemen:

Subject to the conditions and for the considerations hereafter set forth, Signal Oil and Gas Company hereby offers to purchase from you the following properties, to wit:

All leases, gas contracts or other purchase agreements held by Bankline for the purchase or processing of wet gas from properties located in the Signal Hill Oil Field. A schedule of said instruments is hereunto attached and by this reference made a part hereof and marked Exhibit "A."

Signal Oil and Gas Company offers to pay for the above-described properties the sum of $85,000.00, plus further sums of money calculated in the following manner:

Signal shall process said wet gas, or cause said wet gas to be processed, at its plant in the Signal Hill Oil Field or at such other plant or plants as Signal shall hereafter elect, whether or not said plants shall be owned and/or operated by Signal. All dry

gas resulting from said operations not required to be returned to the properties from which produced shall be sold by Signal and the net sales price paid to Bankline monthly. All natural gasoline and LPG Propane extracted by Signal from said wet gas shall likewise be sold by Signal at the average price it receives for like products sold by Signal, and Signal shall pay to Bankline monthly a sum of money equal to the sales price of said natural gasoline and LPG Propane, less the following sums, to wit:

> The sum of 2½c per gallon on all natural gasoline and the sum of 1¼c per gallon on all LPG Propane.

Said deductions are based upon the present price of 8.33c per gallon posted by Standard Oil Company of California for 21# R. V. P. natural gasoline in the Signal Hill Oil Field and shall be increased or decreased at the times and in direct proportion to any increase or decrease above or below said price of 8.33c per gallon posted by Standard Oil Company of California for 21# R.V.P. natural gasoline in the Signal Hill Oil Field.

Connections shall be established between the wet gas lines presently owned and operated by Bankline and those presently owned and operated by Signal at two locations, to wit: in the proximity of Temple and Hill Streets and in the proximity of Willow and Walnut Streets, Signal Hill, and transmission of said gas shall be made at said points or

at other points if in Signal's judgment other connections shall be required. Signal shall also connect its dry gas lines to the dry gas lines presently owned and operated by Bankline in the proximity of Cherry and Willow Streets for delivery of gas to the properties from which it is produced, when such redelivery shall be required. Signal shall meter the wet gas in master meters installed for said purpose and shall make all applicable tests at said points, accounting to Bankline for the entire amount of wet gas received pursuant to this agreement without allocation as to the individual properties from which said gas is produced.

Signal in its operations hereunder shall use the same metering, testing, and accounting procedure currently used by Signal in connection with other wet gas being purchased by Signal in said Signal Hill field and drips secured from the pipe-line system of Bankline will be accounted for on the same basis as other drips collected by Signal; provided, however, that such procedures of metering, testing and accounting shall conform with the provisions of the agreements described in Exhibit "A" as modified from time to time by usages and customs in the industry.

This agreement shall remain in full force and effect for the period of ten years from November 1, 1952, and thereafter so long as Signal shall elect. In the event that at any time after ten years from November 1, 1952, Signal shall desire not to receive and/or process the wet gas produced from the prop-

erties described in Exhibit "A" it shall give written notice to that effect to Bankline. Within thirty days after said notice Bankline by written notice to Signal may elect to purchase the leases, gas contracts and other purchase agreements herein purchased from Bankline for the sum of $10.00 and have such of said leases and other agreements then remaining in effect reassigned to it, and upon notice to that effect Signal shall reassign all of said leases and agreements. In the event Bankline shall not elect to receive such reassignments, then Signal may without further obligation to Bankline sell or assign said agreements to third parties or may quitclaim, surrender or otherwise terminate any or all of them.

If the foregoing is acceptable to you, will you please so indicate by signing and returning the carbon copy of this letter.

Yours very truly,

SIGNAL OIL AND GAS COMPANY,

By /s/ R. H. GREEN,
Vice President.

Accepted this 1st day of November, 1952.

BANKLINE OIL COMPANY,

By /s/ L. L. AUBERT.

EXHIBIT "A"

(a) Contract for the treatment of wet gas, dated June 15, 1936, by and between Bankline Oil Company and Jet Oil Company.

(b) Contract for the treatment of wet gas, dated December 1, 1950, by and between Bankline Oil Company and M. K. Doumani.

(c) Contract for the treatment of wet gas, dated December 6, 1932, by and between Bankline Oil Company and D. D. Dunlap.

(d) Contract for the treatment of wet gas, dated June 9, 1922, amended May 17, 1927, by and between Bankline Oil Company and General Petroleum Corporation.

(e) Contract for the treatment of wet gas, dated October 1, 1938, by and between Bankline Oil Company and Incorporated Production Co.

(f) Contract for the treatment of wet gas, dated January 1, 1952, by and between Bankline Oil Company and Progressive Oil Company.

(g) Contract for the treatment of wet gas, dated March 15, 1934, by and between Bankline Oil Company and William C. McDuffie, as Receiver of Richfield Oil Company of California.

(h) Contract for the treatment of wet gas, dated May 25, 1925, by and between Bankline Oil Company and The Superior Oil Company.

EXHIBIT No. 4

Installment Note

Los Angeles, California,

December 1, 1952.

$85,000.00.

In installments, and at the times hereinafter stated, for value received, Signal Oil and Gas Company promises to pay to Bankline Oil Company, or order, at Los Angeles, California, the principal sum of Eighty-five thousand dollars, without interest. Said principal sum is payable in twenty monthly installments of Four Thousand dollars ($4,000.00) each on the 25th day of each and every month, beginning on the 25th day of December, 1952, and a final payment of Five thousand dollars ($5,000.00) due on the 25th day of the twenty-first month. Principal is payable in lawful money of the United States of America.

Should suit be commenced to collect this note, or any portion thereof, such sum as the court may deem reasonable shall be added hereto as attorney's fees.

SIGNAL OIL AND GAS COMPANY,

By /s/ R. H. G.,

By /s/ H. F. C.

EXHIBIT No. 5

Letterhead of

Signal Oil and Gas Company
Los Angeles 17, California

December 1, 1952.

Bankline Oil Company,
437 South Hill Street,
Los Angeles, California.

Gentlemen:

Reference is made to the transaction in which Bankline Oil Company sold to Signal Oil and Gas Company certain leases, gas contracts and other purchase agreements held by Bankline for the purchase or processing of wet gas from properties located in the Signal Hill Oil Field. The sales price of said agreements was the sum of $85,000.00, payable in twenty monthly installments of $4,000.00 each, and a final installment of $5,000.00.

For good and valuable consideration, Signal Oil and Gas Company hereby agrees to indemnify and hold Bankline Oil Company harmless from the payment of any greater United States corporate income tax pursuant to Sections 13, 15 and 430 of the Internal Revenue Code on the receipt of said sum of $85,000.00 than the said income tax calculated on said sales price pursuant to Section 117 of said Code.

Yours very truly,

SIGNAL OIL AND GAS COMPANY,

By /s/ R. H. GREEN,
Vice President.

FORM 1120
Treasury Department
Internal Revenue Service

COMPLETED RETURN

U. S. CORPORATION INCOME TAX RETURN

FOR CALENDAR YEAR 1952 Extension granted to 4-15-53 **1952**

Page 1

or fiscal year beginning ..., 1952, and ending ..., 1953

File Code CI 5 68
Serial No. CI - 1102
District

(Cashier's stamp)
RECEIVED
95 APR 15 1953
DIRECTOR INT REV
LOS ANGELES
TELEPHONE

PRINT PLAINLY CORPORATION'S NAME AND ADDRESS

92-3106

Bankline Oil Company
(Name)
437 South Hill Street
(Street and number)
Los Angeles 13, California
(City or town, postal zone number) (State)

Date incorporated 5/20/12 State or country California

Principal business activity (See Instruction N) Petroleum refining

Business group code number (from Instruction N) 291

Number of places of business

$

291

POSTING DATE
MAY 18 53

NET INCOME COMPUTATION

GROSS INCOME

1.	Gross sales (where inventories are an income-determining factor). $; Less: Returns and allowances $			$	
2.	Less: Cost of goods sold. (From Schedule A)				
3.	Gross profit from sales			$	
4.	Gross receipts (where inventories are not an income-determining factor). From Schedule A	$ 6444986	52		
5.	Less: Cost of operations. (From Schedule B)	4738356	96	1706629	56
6.	Gross profit where inventories are not an income-determining factor			500	00
7.	Dividends. (From Schedule C)			23411	27
8.	Interest on loans, notes, mortgages, bonds, bank deposits, etc.				
9.	Interest on corporation bonds, etc.:	Gross Amount of Interest $	Less: Amortizable Bond Premium $		
10.	(a) Interest on United States savings bonds and Treasury bonds owned in excess of the principal amount of $5,000 issued prior to March 1, 1941. (b) Interest on obligations of certain instrumentalities of the United States issued prior to March 1, 1941. (c) Interest on Treasury notes issued on or after December 1, 1940, and obligations issued on or after March 1, 1941, by the United States or any agency or instrumentality thereof.				
11.	Rents			3570	80
12.	Royalties				
13.	(a) Net short-term capital gain reduced by any net long-term capital loss. (From Schedule D)				
	(b) Net long-term capital gain reduced by any net short-term capital loss. (From Schedule D)			93758	72
	(c) Net gain (or loss) from sale or exchange of property other than capital assets. (From Schedule D)			1633	24
14.	Other income. (State nature) See schedule			9415	34
15.	Total income in items 3, and 5 to 14, inclusive			$	1839919 93

DEDUCTIONS

16.	Compensation of officers. (From Schedule E)			$ 72193	69
17.	Salaries and wages (not deducted elsewhere)			248155	13
18.	Rent			23592	75
19.	Repairs (do not include cost of improvements or capital expenditures)				
20.	Bad debts. (From Schedule F)			532	50
21.	Interest			10773	68
22.	Taxes. (From Schedule G)			143675	87
23.	Contributions or gifts paid. (From Schedule H)			3290	00
24.	Losses by fire, storm, shipwreck, or other casualty, or theft. (Submit schedule)				
25.	Depreciation. (From Schedule I)			255569	44
26.	Depletion of mines, oil and gas wells, timber, etc. (Submit schedule)			276288	16
27.	Amortization of emergency facilities. (Submit schedule)				
28.	Advertising				
29.	(a) Amounts contributed under a pension, annuity, stock bonus, or profit-sharing plan				
	(b) Amounts contributed under other employee benefit plans				
30.	Other deductions authorized by law. (From Schedule J)			638312	02
31.	Total deductions in items 16 to 30, inclusive				1672593 14
32.	Net income before net operating loss deduction (item 15 less item 31)			$	166325 79
33.	Less: Net operating loss deduction. (Submit statement)				
34.	Net income			$	166325 79

TOTAL INCOME AND EXCESS PROFITS TAX

35.	Total income tax (line 9, page 3)			$ 56391	15
36.	Less: Credit for income taxes paid to a foreign country or United States possession allowed a domestic corporation				
37.	Balance of income tax due			$ 56391	15
38.	Excess profits tax due (line 39, Schedule EP (Form 1120))				
39.	Total income and excess profits tax due (item 37 plus item 38) (For installment payments, see General Instruction D)			$	56391 15

DECLARATION. (See Instruction E)

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, each for himself declares under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by him and it, to the best of his knowledge and belief, is a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Internal Revenue Code and the regulations issued thereunder.

(President or other principal officer) (State title) President

April 10, 1953
(Date)

(Treasurer, Assistant Treasurer, or Chief Accounting Officer) (State title) Vice Pres.

CORPORATE SEAL

DECLARATION. (See Instruction E)

I/we declare under the penalties of perjury that I/we prepared this return for the person named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the tax liability of the person for whom this return has been prepared of which I/we have any knowledge.

(Signature of person preparing the return)

(Date)

(Signature of person preparing the return)

16—67497-1

(Name of firm or employer, if any)

Schedule A.—COST OF GOODS SOLD. (See Instruction 2)

Inventory at beginning of year	$
Merchandise bought for manufacture or sale	
Salaries and wages	
Other costs (Submit schedule)	
Total	$
Less: Inventory at end of year	
Cost of goods sold (enter here and as item 2, page 1)	$

Schedule B.—COST OF OPERATIONS

Salaries and wages	$
Other costs (to be detailed)	
(a)	
(b) See Schedule "B"	
(c) next to last column.	
(d)	
(e)	
Total (enter here and as item 5, page 1	$

Schedule C.—INCOME FROM DIVIDENDS

1. Name and Address of Paying Corporation	2. *Domestic Corporations Taxable Under Chapter 1, Internal Revenue Code	3. Certain Preferred Stock of Public Utilities Taxable Under Chapter 1, Internal Revenue Code	4. Foreign Corporations	5. Other Corporations
State Oil Co., San Francisco, Calif.	$ 500 00		$	$
Totals	$ 500 00		$	$
Total of columns 2, 3, 4, and 5. (Enter here and as item 7, page 1)				$ 500 00

* Exempt dividends on certain preferred stock of public utilities which should be entered in column 3, and dividends received from China Trade Act corporations, and from corporations entitled to the benefits of section 251 of the Internal Revenue Code, which should be entered in column 5.

Dividends on share accounts in Federal savings and loan associations in case of share accounts issued prior to March 29, 1942, should not be listed, but the amount should be included on item 10 (d), page 1; dividends on share accounts issued on or after March 29, 1942, should be reported in column 5.

Schedule D.—Separate Schedule D (Form 1120) should be used in reporting sales or exchanges of property and filed with this return. (See Instruction 13)

Schedule E.—COMPENSATION OF OFFICERS

1. Name and Address of Officer	2. Official Title	3. Time Devoted to Business	Percentage of Corporation's Stock Owned: 4. Common	4. Preferred	5. Amount of Compensation
L. T. Barneson, 256 Montgomery St.S.F.	Ch. of Board	35%	12.2%		$ 7,263 30
L. L. Aubert, 437 S. Hill St., L.A.	President	70%	2.07%		20,988 30
V. Harrell, 437 S. Hill St., L.A. 13,	Vice Pres.	70%	.05%		9,828 60
R. C. Peterson, 256 Montgomery St.S.F.	Vice Pres.	14%	.03%		3,648 15
J. L. Barneson, 437 S. Hill St., L.A.	Vice Pres.		8.67%		
W. E. Kropp, 256 Montgomery St., S.F.	Sec'y-Treas.	70%	.03%		8,731 80
Lucille Lyle, 437 S. Hill St., L.A.	Ass't.Sec'y.	70%	.13%		6,287 77
R. J. Case, 437 S. Hill St., L.A. 13,	Ass't.Sec'y.	30%			6,203 00
Ray Childers, 437 S. Hill St., L.A.	Ass't.Sec'y.	100%	.01%		9,452 67
Total compensation of officers. (Enter here and as item 16, page 1)					$ 72,403 59

Schedule F.—BAD DEBTS. (See Instruction 20) (See note)

1. Specific Year	2. Amount of Notes and Accounts Receivable Outstanding at—: Beginning of Year	2. End of Year	3. Bad Debts Reported	4. Notes on Account	5. Bad Debts of Corporation Charged to Reserve by Current or Prior Years	6. Corporation Carries a Reserve: Gross Amount Added to Reserve	6. Amount Charged Against Reserve
1948	$578086 32	$1079640 98	$ 390618 30	$1948586 75	$ Ø	$	$
1949	1079640 98	635807 21	208180 95	1903839 05	Ø		
1950	635807 21	1068890 80	1998219 63	1809872 25	10591 30		
1951	1068890 80	747905 97	160146 82	1927777 55	417 08		
1952	747905 97	1831238 16	166325 79	6444986 52	532 50		

Recoveries which are capital assets and which became worthless within the taxable year should be reported in separate Schedule D

Schedule G.—TAXES. (See Instruction 22)

Kinds	Amount
City and County taxes	$ 142647 91
Texas Franchise tax	972 92
California Franchise tax	25 00
Utah Franchise tax	10 04
Colorado	15 00
Wyoming	5 00
Total. (Enter here and as item 22, page 1)	$ 143675 87

Schedule H.—CONTRIBUTIONS OR GIFTS PAID. (See Instruction 23)

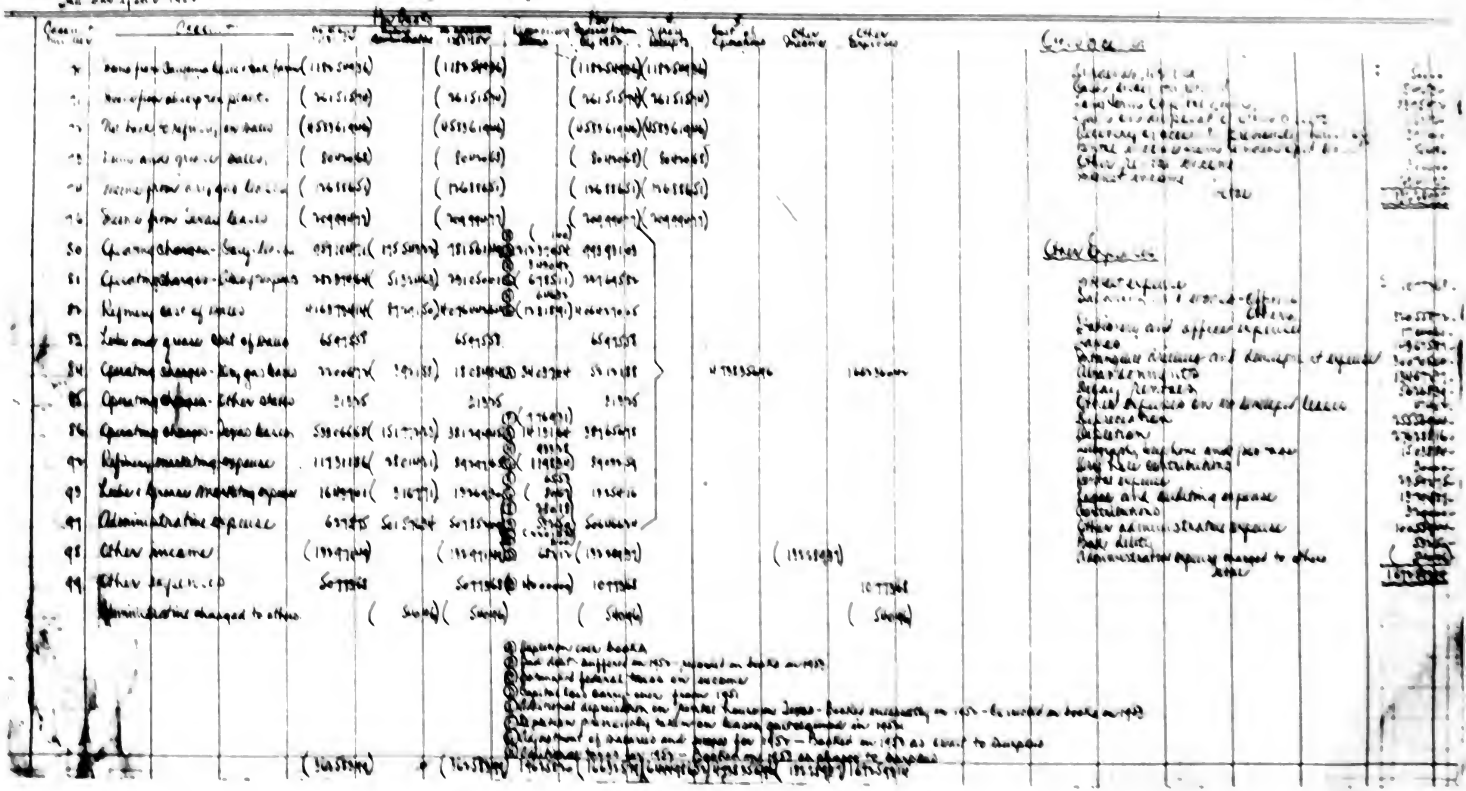
Name and Address of Organization	Amount
	$
Total. Enter here and as item 23, page 1, subject to 5 percent limitation See Instruction 23	$

Schedule I.—DEPRECIATION. (See Instruction 25)

1. Kind of Property (If Buildings, state material of which constructed.) Exclude land and other nondepreciable property	2. Date Acquired	3. Cost or Other Basis	4. Depreciation Allowed or Allowable in Prior Years	5. Remaining Cost or Other Basis To Be Recovered	6. Life Used or Accumulative Depreciation	7. Estimated Life From Beginning of Year	8. Depreciation Allowable This Year
		$	$	$			$
See schedule.							
Total. (Enter here and as item 25, page 1)							$

Provincial Exchequer
Receipts and Expenditure on account of Revenue
Calendar Year 1954

Schedule "B"



SCHEDULE D (Form 1120)
U. S. Treasury Department
Internal Revenue Service

1952

SCHEDULE OF GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY

For Calendar Year 1952

or taxable year beginning ....., 1952, and ending ....., 1953

Name and address Bankline Oil Company, 437 South Hill St., Los angeles 13, California

(1) CAPITAL ASSETS

1. Description of Property	2. Date Acquired Mo. Day Year	3. Date Sold Mo. Day Year	4. Gross Sales Price (Contract Price)	5. Depreciation Allowed (or allowable) Since Acquisition or March 1, 1913 (Furnish details)	6. Cost or Other Basis and Cost of Improvements Subsequent to Acquisition or March 1, 1913	7. Expense of Sale	8. Gain or Loss (Column 4 plus column 5 less the sum of columns 6 and 7)
SHORT-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR NOT MORE THAN 6 MONTHS							
1.			$	$	$	$	$
2. Unused net capital loss carry-over from five preceding taxable years (attach statement)							682 12
3. Total of short-term capital gains or losses or difference between short-term capital gains and losses							$
LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 6 MONTHS							
4.			$	$	$	$	$
See schedule							94440 84
5. Total of long-term capital gains or losses or difference between long-term capital gains and losses							$ 93758 72

SUMMARY OF CAPITAL GAINS AND LOSSES

Classification	Gain or Loss To Be Taken Into Account (a) Gain	(b) Loss
6. Net short-term capital gain or loss from line 3	$	$
7. Net long-term capital gain or loss from line 5	$ 93758 72	$
8. Net short-term capital gain (line 6, col. (a)) reduced by any net long-term capital loss (line 7, col. (b)). Enter here and as item 13 (*a*), page 1, Form 1120	$	XXXXXXX XX
9. Net long-term capital gain (line 7, col. (a)) reduced by any net short-term capital loss (line 6, col. (b)). Enter here and as item 13 (*b*), page 1, Form 1120.	$ 93758 72	XXXXXXX XX
10. Excess of losses over gains in lines 6 and 7. This excess is not allowable	XXXXXXX XX	$

COMPUTATION OF ALTERNATIVE TAX

11. Surtax net income (line 5, page 3, Form 1120)	$ 165900 79
12. Less: Net long-term capital gain reduced by any net short-term capital loss (line 9 of summary)	93758 72
13. Surtax net income for purpose of alternative tax	$ 72142 07
14. Combined normal tax and surtax. If amount of line 13 is: Not over $25,000; enter 30 percent of line 13 (32 percent if a consolidated return). Over $25,000. Compute 52 percent of line 13 (54 percent if a consolidated return). Subtract $5,500. Enter difference	$ 32013 88
15. Less: Normal tax adjustment for partially tax-exempt interest; enter 30 percent of the sum of items 10 (*a*) and 10 (*b*), page 1, Form 1120, but not in excess of 30 percent of line 13	
16. Partial tax	$ 32013 88
17. 26 percent of line 12	24377 27
18. Alternative tax (line 16 plus line 17)	$ 56391 15
19. Normal tax and surtax (line 8, page 3, Form 1120)	$ 30769 41
20. Tax liability (line 18 or 19, whichever is lesser). Enter here and as line 9, page 3, Form 1120	$ 56391 15

(2) PROPERTY OTHER THAN CAPITAL ASSETS

1. Description of property	2. Date acquired Mo. Day Year	3. Date sold Mo. Day Year	4. Gross Sales Price (Contract price)	5. Depreciation Allowed (or allowable) Since Acquisition or March 1, 1913 (Furnish details)	6. Cost or Other Basis and Cost of Improvements Subsequent to Acquisition or March 1, 1913	7. Expense of Sale	8. Gain or Loss (Column 4 plus column 5 less the sum of columns 6 and 7)
1. Casing	3/20/52		$ 14582 63	$	$ 132 63	$	$ 1161 26
Tubing	3/20/52		1 2		12 11		454 12
Casing	6/2/52		163 51		13 25		11 71
2. Total net gain (or loss). Enter here and as item 13 (*c*), page 1, Form 1120							$ 1633 24

State with respect to each item of property reported in Schedule D (1) and (2) (1) how property was acquired (2) whether at time of sale or exchange (*a*) purchaser owned directly or indirectly more than 50 percent in value of your outstanding stock, (*b*) where purchaser was a corporation, more than 50 percent in value of its capital stock and 50 percent in value of your capital stock was owned directly or indirectly by or for the same individual or his family, and (*c*) where purchaser was a corporation, whether more than 50 percent in value of its capital stock was owned directly or indirectly by you If so, state name and address of purchaser

Instructions For Insurance Companies Using This Schedule

Companies taxable under section 204 and having losses from capital assets sold or exchanged in order to obtain funds to meet abnormal insurance losses, etc., shall attach a schedule corresponding to Schedule D, Form 1120M

For companies taxable under section 204 or section 207 (a) (1) or (3), "net capital loss" means the amount by which the losses for the taxable year from sales or exchanges of capital assets exceed the sum of the gains from such sales or exchanges and the lesser of: (1) the corporation surtax net income computed without regard to gains or losses from sales or exchanges of capital assets, or (2) losses from the sale or exchange of capital assets sold or exchanged to obtain funds to meet abnormal insurance losses and to provide for the payment of dividends and similar distributions to policyholders

For companies taxable under section 207 (a) (1) or (3), all references to items or line numbers, Form 1120, shall be considered as references to the appropriate "item" or "line" in Form 1120M. It will be necessary for such companies to substitute for lines 14, 15, and 16 of the above alternative tax computation, a computation conforming to that on page 2 of Form 1120M.

16—67617-1

[illegible] Oil [illegible]
Depreciation Summary
Calendar year 1952

	12/31/51	Additions	Transfers	Retirements	12/31/52	12/31/51	Transfers	Provision	Retirement Charges	Replacement Charges	12/31/52
Field and lease equipment	$32553644.14	$9385598		$449693.78	$41489410.84	$20081318.23	$	$1186880.4	$4562[illegible]		$21670503.44
Signal Hill absorption plant	503409.14			503409.14		489753.76			489753.76		
Maricopa absorption plant			1595786.86	41418.80	1554368.06		1378460.55	17865.5	[illegible]50.51	113794.42	1348535.17
Bakersfield refinery		2785488	2393644.36	2500	2421[illegible]		282664.50	80739.16			363403.66
Santa Fe Springs absorption plant			1083444.76	87500	1082547.76		1078157.17				1078157.17
Buildings and improvements	3139100	[illegible]12.50			31607.50	4899.42		3160.27			8060.19
Marketing facilities		21648	1078684.40	2125340	1057640.78		550047.82	44463.99	7144.70		587367.11
Automotive equipment	95027.01	34474.95	166674.48	12683.61	283444.63	62449.83	141004.70	[illegible]54	9657.07		217081.00
Furniture and fixtures	26518.7	13277.52	4059.56	1278.13	42610.82	37404.5	3414.00	5565.13	719.49		44854.29
Totals	32661277.16	16914493.1	6313127.52	1080036.36	86691111.63	26003314.49	3430559.74	[illegible]824.68	4986583.6	113794.42	53216855.13

Less provision for depreciation of automotive equipment—charged direct 33[illegible]54
Depreciation charged to others 20197.0 | 2525524

Depreciation per line 25, page 1 of return 2555694.46

Maricopa Plant
Brought forward
July
August
September
October
November

Cost	Salvage	Depreciable Cost	Reserve for Depreciation	Charges to Reserve	Adjusted Reserve	Balance Subject to Depreciation	Remaining Life	Depreciation Current Month	
1599174.87	159917.49	1439257.38	1379107.02	205.57	1378321.45				
13319.01	1331.90	1427208.17	1379300.92	4051.97	1375369.55	51933.62	120 months	433.83	August
3721.50	372.15	1433858.83	1375700.37	2605.41	1373097.66	50761.56	119	436.56	September
36875.40	3687.54	1390670.76	1393503.02	16071.45	1357452.37	33218.59	118	281.51	October
82190	8219	1389931.35	1357733.18	3996.44	1354717.74	35193.51	117	300.80	November
		1389931.35	1355038.50	5111.44	1349927.40	40003.35	116	344.86	December
1344[illegible]	154493.01	1389931.35	1350372.06	1737.09	1348555.17			1796.55	

Bakersfield refinery
Brought forward
July
August
September
October
November

Cost	Salvage	Depreciable Cost	Reserve for Depreciation	Charges to Reserve	Adjusted Reserve	Balance Subject to Depreciation	Remaining Life	Depreciation Current Month	
2374213.86	118714.45	2255599.41	266754.04		266754.04				
19360.50	968.02	2273966.89	282667.60		282664.30	1991302.39	124 months	16058.89	August
8426.88	421.29	2281971.48	298723.49		298723.49	1983247.99	123	16123.97	September
2890.44	134.52	2284537.40	314847.46		314847.46	1969679.94	122	16144.92	October
6115.72	305.79	2290337.33	330992.38		330992.38	1959344.95	121	16192.93	November
3222.54	161.13	2293398.74	347185.31		347185.31	1946213.53	120	16218.45	December
3414103.94	120705.20	2293398.74	363403.66		363403.66			80739.16	

Falcon? Oil Company
Depreciation of wells and lease equipment
Calendar year 1952

	Lease	Investment 12/31/51	Investment Additions	Investment 12/31/52	Reserve for Depreciation 12/31/51	Reserve Diminution	Reserve Additions	Book Value	Provision for Depletion 12/31/51	Adjustments	12/31/52	Depletion Base	Rate %	Reserves 12/31/51	Adjustments	As Adjusted	Gross Sales 1952	Depreciation Amount
11 10	Union Pacific	230290408	5969 82	230888093	17063778		17063778	6026161	1748467 8	798 07	1751148 5	4773 19	44.00	456004 6 a	160000	616004 6	171384	13280 50
12 10	Sam. Hale Comm	210263 44	2834 8	210546 62	147816 71	(26 51)	147818 72	62777 90	10087 18	1417	10096 85	5763 55	33.33	158418 a		158418	34757	11547 39
13 11	Geo. Jones Comm	197330 72	(3440 42)	196936 30	153563 40	159 54	153405 48	43530 82	9110 61	(19 70)	9100 89	34179 93	37.50	109998 L		109998	26401	8196 95
13 12	Watson	55884 65	101 24	55940 69	41774 19	(81)	41775 00	14215 69	2669 71	5 04	2675 03	11540 66	41.67	12465 S		12465	5853	5418
13 13	Clear Yard	53994 59	61 92	53944 99	39464 57	(54)	39460 11	14144 78	2534 79	3 43	2538 34	11606 39	44.68	21633		21633	5799	3111 44
13 10	Indigeno	35109 71	3 85	35113 09	28065 78	6 60	28058 68	7054 41	2048 74		2048 55	5005 86	87.50	77959		77959	13993	960
13 11	Cedar	69436 67	(81 51)	69355 16	53683 41	38 51	53644 90	15710 26	3839 61	(19)	3843 68	11866 58	87.50	175140		175140	36959	2560 15
13 12	Berry	47908 83	11 54	47920 37	37940 19	19 85	37920 57	10000 80	2174 24	58	2174 82	7825 91	87.83	16235		16235	4154	2339 84
13 13	Black	108798 02	(251 96)	108536 06	67452 43	188 73	67263 70	41272 36	6297 52	(14 60)	6282 92	35047 44	87.50	301446		301446	57900	6151 48
14 10	Section 6	86760 95	1540 38	102717 33	85284 50	1679 83	84606 27	18110 46	1027 65	770 47	1798 12	16317 34	100.00	46790		46790	16645	3165 78
14 11	Section 15	60307 60	(127 86)	60179 74	60229 48	236 85	59985 13	194 61	15 62	(6 09)	9 53	115 38	86.00	4379		4379	2555	68 49
14 12	Sec. ...	41681 93		41681 93	41653 99		41653 99	28 54	28 54		28 54		87.00	14606		14606	10096	
14 13	Section 32	39238 5	(5124)	34116 1	34143 30	359 44	34103 00	24 91	215 48	(25 61)	189 87	10144	100.00	4610		4610	2041	44 44
14 14	Section 36	104580 6	2993 08	107573 14	100301 65		100301 65	7271 49	4278 41	144 65	4422 06	2843 43	95.00	99376	47500	144876	25797	506 30
15 10	Smithrose	19677 17	(3279 14)	16397 96	19147 34	2000 01	15466 50	931 46	2200 76	(1269 50)	931 76		100.00					
16 10	Section 35	59662 71	1845 4	59478 17	16463 14	141 04	16287 10	1319 10	3584 06	9 43	3594 83	9616 19	90.00	25261		25261	7238	2755 81
17 10 & 11	Alf. O. Wiland T.F	468 145 43	(468 145 43)		449988 24	449988 24			18157 10	(18157 10)			97.50	18943		18943	4517	
18 10	Beebe Bralle	32235 60		32235 60	31389 51		31389 51	846 09	846 09		846 09							
18 11	Beebe Bignell	34990 93		34990 93	34072 52		34072 52	918 41	918 41		918 41							
18 12	Black W	83315 37		83315 37	81128 59		81128 59	2186 78	2186 78		2186 78							
18 13	Jonah Jones	104657 13		104657 13	101910 70		101910 70	2746 43	2746 43		2746 43							
18 14	Bignell	35768 78		35768 78	34829 96		34829 96	938 82	938 82		938 82							
2-10	Nelson	40787 78		40787 78	37307 62		37307 62	3480 16	2039 38		2039 38	1440 78	5.21	26890	36470	63360	15862	3606 9
23 10	Vail	1 00		1 00	1 00		1 00						43.03	85343		85343	12754	
24 10	Waite-Bradley	133497 73	82 09	133579 82	75145 58	40 57	75105 01	58474 81	6674 88	4 10	6678 98	51795 83	87.50	192147		192147	51340	13834 9
30 10	A & L	977 24	(977 24)						977 24	(977 24)								
45 10	Comm #1	3897 72		3897 72	1308 65		1308 65	2588 77	221 73		221 73	2367 04	33.96	510562		510562	21496	99 65
45 11	#9	2319 90		2319 90	621 18		621 18	1698 72	152 99		152 99	1545 73	14.28	833391 C		833391	16110	30 74
45 12	#10	1252 61	14 97	1267 58	381 70		381 70	886 58	57 71	75	58 46	827 42	14.28	132422 F		132422	9993	62 47
45 13	#15	991 06		991 06	281 49		281 49	709 57	62 29		62 29	647 28	14.28	601460		601460	25283	27 70
45 14	#16	1402 16		1402 16	346 47		346 47	1055 69	68 49		68 49	987 20	14.28	206268		206268	10300	44 49
45 15	Capitola	4225 95		4225 95	360 77		360 77	3865 18	273 70		273 70	3591 48	19.54	5656860	390800	6047660	159283	94 69
45 16	Excelsior	1630 40		1630 40	94 10		94 10	1536 30	98 50		98 50	1437 80	19.54	2160387	(1172400)	987987		
45 17	Hayden Comm	1914 80		1914 80	213 23		213 23	1701 57	140 76		140 76	1560 81	19.54	5650416		5050416	107434	33 70
45 18	McGillivray Comm	1817 68		1817 68	168 46		168 46	1649 22	97 83		97 83	1551 39	19.54	1446510	(254000)	1192440	23905	31 12
45 19	Mideans	1759 97		1759 97	174 00		174 00	1585 97	84 11		84 11	1501 86	19.54	337017	(195400)	141617	6813	72 65
45 20	Thornton Unit	4187 87		4187 87	427 38		427 38	3760 49	264 43		264 43	3496 06	19.54	6291755	(586200)	5705555	98073	[illegible]
45 21	Hemphiner	1610 06	96 04	1706 10	159 06		159 06	1548 04	93 52	4 84	98 36	1449 68	19.54	2600358	(1211480)	1388878	27879	[illegible]
45 22	Goodhue-Capitola	3621 04		3621 04	475 24		475 24	3145 80	181 05		181 05	2964 75	19.54	2816625	(879300)	1937325	82240	128 85
60 12	[illegible]-Commander #1	47231 83	5804 68	53036 51	13241 95	49 85	13191 50	39877 01	2361 59	292 13	2653 72	37223 29	41.02	61775 B		61775	7028	423 [illegible]
60 13	[illegible]	42416 40	(2705 04)	39711 36	11614 57	1260 36	10354 21	29356 24	2120 84	(135 27)	1985 57	27366 67	41.02	80904 B		80904	9582	324 [illegible]
60 14	[illegible]	20234 08	3382 35	23616 43	7194 19		7194 19	16436 24	1012 00	169 42	1181 42	15254 82	41.02	38362 L		38362	15397	672 61
60 15	[illegible]	25843 31	3160 83	29004 14	8321 32	43 01	8278 31	20769 83	1293 98	158 42	1452 40	19317 43	41.02	39797 S		39797	16405	[illegible]
60 16	[illegible] Brana	8224 78	5089 63	13314 41	1537 44		1537 44	11776 97	411 44	254 48	665 92	11111 25	41.02	8220	20510	28730	12197	471 35
60 17	[illegible] Hale	4692 43	2207 60	6900 03	663 10	28 13	634 97	6271 06	234 95	110 36	345 31	5925 75	41.02	5239		5239	1498	162 [illegible]
61 10	[illegible]-Current #1	14744 91		14744 91	2890 43		2890 43	11859 48	737 49		737 49	11121 99	97.03	41912		41912	3227	156 33
61 11	[illegible]	16080 19		16080 19	1063 11		1063 11	5460 08	804 01		804 01	4646 07	97.03	2382		2382	433	[illegible]
	Carried forward	2589468 72	(4972 61?)	2584 169 [illegible]	2003575 2	16639 43	1586 124 69	5460 448 2	109 166 82	(1863 13)	905 30 69	455513 74		3081 276	(3649 520)	3716 9206	1161 677	1 107 651 50

Pembroke City Council Housing Committee
Minutes of Meeting held on 15th March 1957

Quantego Plantation
Calendar Year 1962

Location	Lessee	Gross Income	Operating Charges	Net Income	27½% of Gross Income	50% of Net Income	Cash Depletion	Allowable Depletion
								109 124 00
11 10	Vann Chapel	346 844 44	127 800 04	219 044 26	109 124 00	134 197 13		
12 10	Montgomery Elevator	72 746 24	80 591 24	(7 845 00)	20 003 67	(3 922 50)		
12 11	Wright Terminal	57 625 60	16 821 16	(13 205 56)	15 846 40	(9 101 78)		
12 12	Graham	11 662 74	35 928 82	(12 266 08)	3 207 66	(6 133 04)		
12 13	Farmers Grain Yard	12 256 10	15 043 86	(2 787 76)	3 367 78	(1 393 88)		
12 14	Capital Company	173 66	33 66	134 99	47 70	70 00		117 70
12 23	Sea Log - All 20	901 41	240 41	660 00	247 79	330 47	724 08	724 08
12 24	Sea Log - Pts	1039 21	379 61	659 60	285 78	329 80	610 58	610 58
13 10	Vidergon	36 273 87	15 176 06	21 097 82	9 976 51	10 548 91		4 976 51
13 11	Graham	81 464 88	31 170 84	50 294 04	22 402 84	25 147 02		22 402 84
13 12	Graham	12 001 56	16 520 69	(4 519 13)	3 300 42	(2 259 57)	913	913
13 13	Clark	126 128 07	51 641 96	68 234 02	34 617 02	34 117 01		34 119 51
13 16	Graham Mineral 24	4 777 78	1 370 61	3 407 17	1 267 89	1 703 58		1 267 89
14 10	Graham G.	44 798 52	128 212 32	(83 413 80)	12 594 54	(41 207 00)		
14 11	Graham 16	4 491 14	6 486 60	(2 045 46)	1 246 91	(1 094 53)		804 18
14 13	Beach 26	24 246 62	8 668 09	20 578 56	8 041 18	10 286 28		
14 13	Graham 32	4 164 91	4 671 60	(506 69)	1 146 72	(253 31)	266 73	266 73
14 14	Graham 36	43 483 99	33 566 44	9 916 66	11 944 16	4 945 28		4 943 28
15 10	Quantego Inc	2 506 44	84 00	2 422 44	689 27	1 211 22		689 27
16 10	Graham 35	11 711 99	13 396 09	(1 684 10)	3 220 97	(841 05)		
17 10	Vann Lease Pete 42	19 256 91	23 483 31	(3 666 40)	5 466 40	(1 833 00)		
18 10	Beach & Graham		(9 00)	9 00		4 50		
18 11	Beach & Signal	1 581 41	4 532 06	3 065 25	2 086 64	1 532 62		1 532 62
18 12	Beach	8 666 84	8 360 52	306 32	2 383 91	152 96		152 96
18 13	Grant Jones	11 398 09	8 646 71	5 751 38	3 183 66	2 874 69		2 874 69
18 14	Signal	4 887 11	2 230 81	2 656 30	1 344 12	1 328 16		1 328 16
22 10	Vann	29 542 16	20 436 99	9 105 17	1 514 25	3 552 55		3 552 58
22 11	Dick & Stewart	2 996 35	513 11	2 483 24	823 16	1 241 62		823 16
22 12	G.C. Dick	482 26	74 15	406 11	133 69	203 06		133 69
22 13	Edward Dick	566 25	73 24	489 01	154 07	244 51		154 07
22 14	Cleatherman	76 52	16 01	60 51	21 04	30 26	470	21 04
23 10	Vale	36 300 26	8 553 36	27 746 90	9 982 76	13 873 45		9 982 76
24 10	Lyman	2 502 89	551 36	1 950 92	688 13	975 46		688 13
26 10	La Brit Cotton Lease	2 618 41	389 36	2 229 05	720 06	1 114 53		720 06
27 10	Community #6	2 078 64	229 96	(23 68)	570 26	(11 84)		
28 10	Virgin Rail	569 30	104 53	464 77	156 56	232 38		156 56
29 10	Vale - Bradley	64 019 97	56 510 06	8 609 91	17 605 41	4 254 80		4 254 80
45 10	Community #7	2 740 87	1 240 50	1 498 37	755 36	749 19		749 19
45 11	Community #9	2 214 84	842 66	1 371 18	609 08	685 59		609 08
45 12	Community #10	1 378 99	558 66	820 33	377 85	410 11		377 85
45 13	Community #15	3 476 66	711 99	2 764 67	956 66	1 382 48		956 66
45 14	Community #16	1 416 66	568 66	847 76	389 61	423 87		389 61
46 15	Capital Company	36 436 81	2 491 32	33 945 55	10 019 86	16 972 77		10 019 86
4516	Broadfoot		9 84	(9 84)		(4 92)		
	Carried Fwd	1199 680 11	780 501 84	419 178 27	329 912 05	209 589 14	1 600 00	299 101 84

Location	Lessee	Gross Income	Operating Charges	Net Income	27½% of Gross Income	50% of Net Income	Cash Depletion	Allowable Depletion
	Brought Fwd	1199 680 11	780 501 84	419 178 27	329 912 05	209 589 14	1 600 00	299 101 84
45 17	Vaughan	24 976 01	2 607 88	21 968 13	6 868 12	10 984 02	105 95	6 763 12
45 18	Mc Kelloway	5 473 82	1 095 01	4 378 82	1 505 24	2 189 11		1 505 24
45 19	Tuscaloosa	1 591 89	446 00	895 89	428 62	447 94		428 62
45 20	Hunter	22 483 95	3 569 86	18 864 09	6 168 34	9 432 05		6 169 34
45 21	Springhouse	6 375 01	1 591 86	4 977 63	1 753 17	2 488 82		1 753 17
45 22	Gen Petroleum Capital	18 812 72	4 648 91	14 163 81	5 173 50	9 081 91		5 173 50
60 12	Buggy Area, Chatham #1	19 518 99	17 206 87	2 312 62	5 367 72	1 156 31		1 156 81
60 18	A. V. Clark	27 574 18	23 482 17	4 092 01	7 582 90	2 041 00	127 94	2 041 00
60 14	R. J. Reynolds	42 991 60	34 904 99	8 086 61	11 822 68	1 043 30	3 858 79	1 043 30
60 15	C. C. Reynolds	45 349 80	29 574 87	17 823 93	12 468 42	8 911 96	320 65	8 911 96
60 16	Lyman & Sons	32 765 85	33 328 85	(512 42)	9 007 85	(256 21)	1 675 61	1 675 61
60 17	Ted Vale	3 891 83	4 281 87	(390 24)	1 070 12	(195 12)	463 46	463 46
61 10	Buggy Area #1	9 121 88	6 163 99	2 957 89	2 508 52	1 478 95		1 478 95
61 11	L. B. Price	1207 28	3 300 46	(2 093 18)	332 00	(1 046 59)	27 96	27 96
61 12	Mrs. Allen	20 285 12	52 716 22	(32 431 10)	5 578 41	(16 215 55)	292 11	292 11
61 15	Nola Lease	12 393 08	38 346 66	(25 953 58)	3 405 60	(12 976 79)	41 26	41 26
65 10	Ballard 4	4 524 82	25 605 70	(21 081 22)	1 244 23	(10 540 61)	2 863 26	2 863 26
65 11	Ballard 26	1 527 10	3 181 48	(1 654 38)	419 95	(827 19)	938 66	938 66
	Totals	1488 401 85	1068 808 02	419 593 83	409 868 28	209 796 92	8 856 66	334 289 44

Cash Register (Day Book)
Calendar Year 1952

Ledger	Name	12/31/51	Cash Adjustments	12/31/52	Remarks	Nominal Ledger 12/31/51	Adjustments	Re-adjusted	Balance Sheet Ledger	Expenses	Balance Sheet 12/31/51	Adjustments	Re-adjusted	Non Depr. Assets Last Yr.	Cash Expenses	Allowance Depreciation	Exp. Charged to Depr. Reserve	Expenses for Depreciation	Non Balance Sheet Items
11 10	Union Pacific	726 93		726 93	Trial Balance				(726 93)							104 124 00	(104 124 00)		
12 10	Montgomery Elevator	14 421 54		14 421 54	do				(14 421 54)										
12 11	Pacific Terminals	20 364 82		20 364 82	do				(20 364 82)										
12 12	Uniform	1517 78		1517 78	do				(1517 78)										
12 13	Unemployment Trust	1189 76		1189 76	do				(1189 76)										
12 14	Ledger 3 - 23 - 42 WC	709 00	(709 00)		Trial Balance 12/31/51														
12 15	Ledger 23 109 - 42 WC	6469 97	(6469 97)		do	3883 98	(3830 98)				1796	(1902)	-						
12 16	Ledger 3 - 30 - 42 WC	200 00	(200 00)		do	153 88	(151 88)				115	(115)	-						
12 17	Ledger 7 - 16 - OTC	325 10	(325 10)		Trial Balance 12/31														
12 18	Ledger 116 611 OTC	7166 71	(7166 71)		do	4661 95	(4661 95)				1241	(1241)	-						
12 20	Ledger 3 - 11 OTC	100 00	(100 00)		do	39 35	(39 35)				53	(53)	-						
12 21	Ledger 1 - 30 - 42 WC	151 70	(151 70)		do	17 84	(17 84)				60	(60)	-						
12 23	Due Ledger 42 WC (Net 19%)		8 430 27	8 430 27	Ledger 12/31/51														
12 24	Due Ledger OTC (Net 20%)		7622 31	7622 31	do		4595 30	4595 30	Ledger (3026 00)	2961 51	-	2144	2144	478	610 58				
13 10	Dickson	1543 85		1543 85	Trial Balance				(1543 85)							9976 51	(9976 51)		
13 11	Osborne	4916 85		4916 85	do				(4916 85)							22 602 34	(22 602 34)		
13 12	Henry	623 16		623 16	do	652 61		652 61		30 54	16 236		16 236	4864	9 15	9 15			
13 13	Hirsch	691 80		691 80	Trial Balance				(691 80)							34 119 61	(34 119 61)		
14 10	Section 6	39 842 60		39 842 60	do				(39 842 60)										
14 11	Section 16	40 600 00		40 600 00	do				(40 600 00)										
14 12	Section 24	116 685 81		116 685 81	do				(116 685 81)							8 041 18	(8041 18)		
14 13	Section 32	17 997 33		17 997 33	do	19 330 04		17 330 04		599 49	4620		4620	2047	265 33	266 33		17665 71	2913
14 14	Section 36	53 749 60		53 749 60	Trial Balance				(53 749 60)							4443 28	(4443 28)		
15 10	Joe Hamm	16 512 05		16 512 05	do				(16 512 05)							694 21	(694 21)		
16 10	Section 36	246 12		246 12	do				(246 12)										
17 10	Hirsch Clean Crew Acct	38 756 91	(38 756 91)																
22 10	Union	33 760 00	560	33 760 00	Trial Balance				(33 760 00)							3693 98	(3693 98)		
22 11	Chas. Kimmell	11 400 00		11 400 00	do				(11 400 00)							823 66	(823 66)		
22 12	A. B. Small	8500 00		8500 00	do				(8500 00)							1335 67	(1335 67)		
22 13	Edmund Small	6775 00		6775 00	do				(6775 00)							156 91	(156 91)		
22 14	Hoffman	3689 10		3689 10		3668 67		3668 67		20 43	152		152	35	4 70	21 04		3689 71	119
23 10	Dietz	3602 60		3602 60	Trial Balance				(3602 60)							4982 76	(4982 76)		
24 10	Mt Hood Radio Corp	2703 99		2703 99	do				(2703 99)							720 00	(720 00)		
28 10	Joyce Rose	4 99		4 99	do				(4 99)							156 56	(156 56)		
29 10	Frank Bradley	8049 80		8049 80	do				(8049 80)							4 264 80	(4 264 80)		
46 10	Community #1	6786 84		6786 84	do				(6786 84)							141 84	(141 84)		
46 11	Community #9	914 97		914 97	do				(914 97)							604 08	(604 08)		
46 12	Community #10	1437 97		1437 97	do				(1437 97)							377 85	(377 85)		
46 13	Community #15	2246 80		2246 80	do				(2246 80)							956 06	(956 06)		
46 14	Community #16	1432 60		1432 60	do				(1432 60)							3 941 51	(3941 51)		
46 15	Capital Company	3423 97		3423 97	do				(3423 97)							10 009 86	(10 009 86)		
46 16	Hoffmann	1258 86		1258 86	do				(1258 86)										
46 17	Community #11	1798 66		1798 66	do				(1798 66)							6 758 12	(6758 12)		
46 18	Mt Hillsboro	494 83		494 83	do				(494 83)							1505 44	(1505 44)		
	Carried Forward	489 324 80	(38 228 91)	451 095 89		29 796 62		29 796 62	(414 107 18)	7191 44	24 274	1108	25 382	7836	1604 92	238 091 80	(230 491 44)	21 467 18	17667

Canal Appropriation (Long Bonds)
Calendar Year 1952

Account	Loans	Cash 1/1/52	Additions	Cash 12/31/52	Encumbrances 1/1/52	Adjustments	As Adjusted	Expenditures Cash	Liquidations Cash	Encumbrances 12/31/52	Accrued Interest 1/1/52	Adjustments	As Adjusted	Interest Charges Collected Cash	Interest Charges Accrued	Adjustments	Interest Charges Liquidated	Interest Charges Accrued 12/31/52	Unexpended Balance 12/31/52	Unexpended Balance 12/31/51
	Unexpended Bal.	489 304 90	(38 226 90)	451 078 01	29 795 52		29 795 52	(24 107 90)	7 141 64	24 276	1108		26 382	7 836	1604 22	232 087 80	(230 487 60)	514 19	1 347	
4619	Nicolaus	349 918		349 918	1 858 71		1 858 71		2 166 81	351 019	(146 600)		141 619	6 813	103 96	628 42		6 169 54		
4520	Hamilton Unit	3 582 86		3 582 86	Zero Applied											6 169 54	(6 169 54)			
4521	Cayuga Inner	4 129 20		4 129 20	do			(3 582 86)								1 159 67	(1 159 67)			
4522	Cayuga Outer	9 196		9 196	do			(4 129 20)								5 179 50	(5 179 50)			
6012.6119	Barge Canal	1666 99		1666 99	do	46 600 96	(46 600 96)	(91 96)								2656 96	(2656 96)			
6013	A. E. Clark	158 871		158 871		4 886		(1666 99)		103 689	(103 689)									
6014	V. H. Kennedy	560 644	(2 666 44)	3 651 56	2 123 79		485 86		1 072 72	20 946			20 946	9 582	127 44	2 061 60		2 526 66	71 332	
6015	C. E. Kennedy	120 178		120 178		2 123 79	2 123 79		931 22	58 362			58 362	16 899	385 99	1 446 80		3 614 05	32 466	
6016	Lyman Brown	490 265		490 265	4 886		4 886		774 82	34 991			34 991	14 446	320 26	841 76		4 936 22	23 392	
6017	Ted Lisle	199 846		199 846	999 72		999 72		3 446 91	1 220	20 610		28 190	12 197	1 619 61	1 679 61		2 662 73	16 693	
6111	L. B. Ring	628 96	136	765 96	243 82		243 82		16 86 74	5 294			5 294	1 458	462 26	646 26		756 84	3 801	
6112	Ring-Nolan	911 99	18 91	930 90	509 97		509 97		153 61	2 382			2 382	423	27 26	27 26		516 33	1 099	
6115	Nolan-Lewis		1066 91	1066 91	300 70		300 70		423 87	16 377			16 377	7 168	274 11	274 11		597 04	9 219	
6410	Barge C. Rec. 8th Lev.	488 80	12 60	501 40					1044 81		12 606		12 606	484	41 36	41 36		41 36	11 818	
6510	Ashland 4		9466 99	9466 99					4 421 03											
6611	Ashland 26		2876 47	2876 47					8461 99		5019		5019	1926	286 96	286 96		286 96	3589	
	Total Cash	526 841 28	(22 596 86)	504 244 71					8 915 47		5019		5019	516	912 62	912 62		912 62	4505	
	Unexpended Loans																			
5001	Alcoholic Bev. Prop.	5559 60		5559 60	106 60		106 60		5464 00									106 60		
5043	Canal - Police	1331 81		1331 81	Zero Applied			(1331 81)												
5068	Multiple Loans	1781 10		1781 10	do			(1781 10)												
7101	W. O. Thomas	2410 60	(158 60)	2252 00	2 200 00	(1497 03)	702 97		72 03									752 97		
7102	J. V. Wells	2 400 00	(225 00)	150 00	2 200 00	(2 062 50)	137 50		12 50									137 50		
7103	R. F. Wood	2 400 00	(2 400 00)	-	2 200 00	(2 200 00)	-													
7104	J. D. Wood & R. F. Wood	4 871 00	(1671 00)	3 200 00	4 400 00	(1509 78)	2 890 22		509 78									2 890 22		
7105	C. W. Applebee	6 800	(600 00)	-	550 00	(550 00)	-													
7106	W. T. Ring	2 400 00		2 400 00	2 200 00		2 200 00		200 00									2 200 00		
	Total	548 613 39	(31 180 96)	517 432 43	165 256 60	(12 398 51)	42 880 16	(47 687 01)	490 806 05	44 269	(266 600)		40 269	10 521	884 46	266 980 46	(146 168 21)	604 811	320 792	

Account	Other Loans	Interest Charges Liquidated
1214	Capital Company	47 10
1314	Oriskany Fire Lab	2668 99
1811	Block & Signal	1527 68
1812	Clerk	152 26
1813	Canal Comm	284 19
1814	Signal	1328 66
2410	Seymour	688 19
		2 476 88

Pacific Gas & Electric Company
Balance Sheet - December 31, 1954

Assets	Beginning of Income Year		End of Income Year	
	Amount	Total	Amount	Total
Cash		$ 268,514,646		$ 207,651,195
Notes and accounts receivable		197,905,877		113,139,816
Inventories		144,144,646		140,646,871
Investments in Treasury Bills		159,646,000		109,977,000
Other investments		15,000		15,000
Depreciable assets	$166,137,746		$669,111,153	
Less reserve for depreciation	2,600,301,199	665,195,547	5,191,100,751	551,171,402
Depletable assets	529,941,152		529,941,152	
Less reserve for depletion	450,820,157	79,120,995	497,190,810	32,750,342
Goodwill and intangible assets		603,889,948		1,147,349,994
Other assets				
Unamortized charges	44,643,288		88,734,228	
Deposits	1,579,000	50,422,288	7,540,115	96,274,343
Total assets		$1,961,313,546		$2,380,181,886

Liabilities				
Accounts payable		603,660,946		1,515,900,555
Notes and acceptances payable				
Reserve for self-insurance fire loss				
Reserve for taxes and assessment			117,647,000	
Other reserves			5,107,000	622,354,000
Accrued expenses:				
Taxes		173,737,747		187,130,000
Payroll		31,913,000		32,198,000
Dividends payable		31,911		31,911
Capital stock — Preferred		600,000,000		833,800,000
Capital stock — Common		241,520,000		241,520,000
Premium on capital stock and surplus		209,253,889		209,253,889
Total liabilities		$1,961,313,546		$2,380,181,886

Cash discounts $ 541,854

Recovery of accounts previously written off 399,000

Total $ 941,854

Long-term Capital Gains and Losses
Schedule D - Line 4

Description of Property	Date Acquired	Date Sold	Gross Sales Price	Depreciation	Cost	Expense of Sale	Gain or (Loss)
1947 Mercury sedan	5866	1/16/54	$ 845.00	$ 181.786	$ 181.786	+	$ 845.00
Lot 9, Block 8181, La Crescenta		1/21/54	156.501	+	145.000	+	11.501
1/3 interest in 3 cows		4/16/54	3,111.17	+	3,577.17	+	(466.00)
Dodge sedan	5163	8/19/54	900.00	977.61	1,513.68	+	(536.07)
Plymouth sedan	5B	8/19/54	650.00	1,111.91	1,111.91	+	650.00
Chrysler sedan	5B	8/18/54	800.00	1,913.34	2,166.42	+	547.92
Land - Paper Lakes - Oakland		8/11/54	3,000.00	+	6,000.00	+	(3,000.00)
Lease for Diesel gen. plant, Humboldt Bay Power Plant, and Rushing Creek power		11/1/54	135,000.00	913,946.76	1,013,646.87	+	977,799.89
Total			145,991.68	916,946.76	1,029,151.76	+	980,806.84

Schedule H - Contributions

Name and address of organization		Amount	Name and address of organization	Amount
Community Chest	Los Gatos	$ 2,000	Brought forward	$ 71,000
Boy Scouts of America		700	Amer. Red Cross	Redwood City	250
Community Chest	Los Altos	500	Community Chest	Gilroy	250
"	Mill Valley	900	Community Chest	Milpitas	500
"	Palo Alto	1,000	Southern Area Building Funds, Inc		1,000
"	Santa Cruz	700	Society of the Pacific		500
Public Library Plans	Orinda	1,000	Eastern Memorial Hospital		4,000
Youth Activities Committee	Pittsburg	500			
Chamber of Commerce	Half Moon Bay	500			
Community Chest	Los Banos	1,000			
Community Chest	Menlo Park	1,000			
Community Chest	Redwood City	1,000			
Community Chest	San Mateo	1,000			
Community Chest	Santa Clara	1,000			
Community Chest	Sunnyvale	1,000			
Community Chest	Vallejo	1,000			
Community Chest	Watsonville	1,000			
Brought forward		$ 71,000	Total	$ 32,000	

Schedule M - Reconciliation of net income and analysis of earned surplus, and undivided profits

Earned surplus, end of preceding taxable year		[illegible]
Earned surplus transferred from Pre-Reserve Corporation due to merger Adjusted 1.1951		[illegible]
Net income (Item 32, page 1 of return)		[illegible]
Depletion of oil and gas wells (Item 9, page 1 of return) Less: Cost depletion, per Sec. 23(m)	[illegible]	[illegible]
Bad debt suffered in 1951, but recorded in books in 1949		[illegible]
Additional depreciation of central heating in Jersey - Increases booked in 1951 - Corrected in books in 1953.		[illegible]
Additional city and county taxes for 1951 - booked in 1953. As charge to surplus,		[illegible]
Accrued interest on Treasury Bonds 1951-55 - Not booked in 1951 booked in 1951 as credit to surplus		[illegible]
Capital loss carry-over from 1951		[illegible]
		[illegible]
Deduct		
Dividends paid in cash	[illegible]	
Provision for Federal taxes on income	[illegible]	
Depletion taxes in prior years, on tonnage on leases which have since been relinquished in 1951	[illegible]	
Reduction of booked bad debt for 1951 - booked as credit to surplus in 1953	[illegible]	[illegible]
Earned surplus, end of taxable year - per books		[illegible]

Schedule J.—OTHER DEDUCTIONS. (See Instruction 20)

See schedule.

NOTE: In the case of amounts expensed for development and exploration of mines, and oil and gas wells, show separately (1) intangible drilling and development costs of oil and gas wells; (2) development expense of mines, and (3) exploration expense subject to limitation. Show separately deductions, if any, computed on natable basis

Schedule K.—COMPUTATION TO DETERMINE NECESSITY FOR FILING EXCESS PROFITS TAX SCHEDULE

1. Net income before net operating loss deduction (item 32, page 1) (Taxpayers which have elected under section 455 to accrue income from installment sales or long-term contracts, enter income so adjusted)	$	
2. Deductions for interest (item 21, page 1) (banks should exclude interest on deposits)		
3. Deductions on account of retirement or discharge of bonds, etc.		
4. Deductions attributable to a grant or loan by a governmental agency to encourage mining of certain minerals		
5. Deductions attributable to technical services rendered to related foreign corporations		
6. In the case of banks, the excess of the deduction for bad debts under the reserve method over debts which actually became worthless during the year		
7. Federal income and excess profits taxes paid by lessee under long-term lease		
8. Total of lines 1 to 7, inclusive	$	

If line 8 is $25,000 or less, Schedule EP (Form 1120) need not be filed with this return. If line 8 is over $25,000, Schedule EP (Form 1120) must be filed.

TAX COMPUTATION. (See Tax Computation Instructions)

1. Net income (item 34, page 1)		$	166325 79
2. Less: Dividends received credit: (a) Enter 85 percent of column 2, Schedule C	$ 425 00		
(b) Enter 62 percent of column 3, Schedule C			
(c) Enter 85 percent of dividends received from certain foreign corporations			
Total dividends received credit. Enter sum of (a), (b), and (c), above, but not to exceed 85 percent of the excess of item 32, page 1, over the sum of items 10 (a) and 10 (b), page 1	$ 425 00		
3. Credit for dividends paid on certain preferred stock if taxpayer is a public utility			
4. Credit for Western Hemisphere trade corporations			425 00
5. Surtax net income		$	165900 79
6. Combined normal tax and surtax. If amount of line 5 is Not over $25,000; enter 30 percent of line 5 (32 percent if a consolidated return) Over $25,000. Compute 52 percent of line 5 (54 percent if a consolidated return). Subtract $5,500. Enter difference		$	80768 41
7. Less: Normal tax adjustment for partially tax-exempt interest; enter 30 percent of the sum of items 10 (a) and 10 (b), page 1, but not in excess of 30 percent of line 5			
8. Normal tax and surtax		$	80768 41
9. Total tax (line 8, or line 20 of separate Schedule D). Enter here and as item 35, page 1		$	56391 15

QUESTIONS

1. If this is the corporation's first return, indicate whether (a) completely new business ☐; or (b) successor to previously existing business, which was organized as (1) corporation ☐, (2) partnership ☐, or (3) sole proprietorship ☐, or (4) other (indicate) _____. If successor to previously existing business, give name and address of the previous business organization _____

2. Director's office where the corporation's return for the preceding year was filed Los Angeles, California

3. Enter amount of income (or deficit) from item 32, page 1, Form 1120 for 1951 ($160,146.82)

4. The corporation's books are in care of Verne Harrell
Located at 437 So. Hill St., Los Angeles, Cal 11

5. Check if the corporation is a farmers' marketing or a farmers' purchasing cooperative association ☐, a consumers' cooperative association ☐, or other cooperative association ☐.

6. Is the corporation a personal holding company within the meaning of section 501 of the Internal Revenue Code? No (If so, an additional return on Form 1120 H must be filed.)

7. Is this a consolidated return? No (If so, procure from the director of internal revenue for your district Form 851, Affiliations Schedule, which shall be filed in and filed as a part of this return; each subsidiary should procure Form 1122 and file in accordance with Instruction I.)

8. If this is not a consolidated return (a) Did the corporation at any time during the taxable year own 50 percent or more of the voting stock of another corporation either domestic or foreign? No; (b) did any corporation, individual, partnership, trust, or association at any time during the taxable year own 50 percent or more of the corporation's voting stock? No (If either answer is "yes," attach separate schedule showing: (1) Name and address; (2) percentage of stock owned; (3) date stock was acquired, and (4) the director's office in which the income tax return of such corporation, individual, partnership, trust, or association for the last taxable year was filed.)

9. Check whether this return was prepared on the cash basis ☐ or accrual basis ☒.

10. Check basis of valuing or method of inventorying material or merchandise at the beginning and end of the taxable year—(a) cost ☐, (b) cost or market, whichever is lower ☒; (c) elective method provided in section 22 (d) ☐; (d) other basis or method ☐. If other basis or method is used, explain fully in separate statement, giving date inventory was last reconciled with stock (see Specific Instructions 2).

11. Did the corporation make a return of information on Forms 1096 and 1099 or Form W-2a for the calendar year 1952? (see General Instruction G-(1)) Yes

12. Has any transaction described in General Instruction G-(3) occurred on or after October 8, 1940? (Answer "yes" or "no") Yes, by merger.

13. Has any transaction described in General Instruction G-(4) occurred on or after January 1, 1951? (Answer "yes" or "no") No

14. Did the corporation, during the taxable year, have any contracts or subcontracts subject to the Renegotiation Act of 1951? (Answer "yes" or "no") No If answer is "yes," state the approximate aggregate gross dollar amount billed during the taxable year under all such contracts and/or subcontracts. $ (See General Instruction G 5.)

15. Did the corporation at any time during the taxable year own directly or indirectly any stock of a foreign corporation? No (If so, attach statement as required by General Instruction K.)

16-61407-1

EXHIBIT No. 7

Signal Oil and Gas Company
General Offices 811 West Seventh Street
Los Angeles 17, California

December 1, 1952.

Bankline Oil Company,
437 South Hill Street,
Los Angeles, California.

Gentlemen:

Reference is made to our letter to you dated October 29, 1952, wherein Signal Oil and Gas Company offered to purchase from you certain leases, gas contracts and other purchase agreements held by Bankline for the purchase or processing of wet gas from properties located in the Signal Hill Oil Field, which offer was accepted by you under the date of the ..... day of November, 1952.

Signal Oil and Gas Company hereby agrees to sell and deliver to you natural gasoline in monthly amounts equivalent to the amount of natural gasoline extracted by Signal from the wet gas processed by it under the provisions of the above-mentioned letter agreement of October 29, 1952. The term of this agreement shall be ten years from November 1, 1952, and so long thereafter as Signal shall be receiving wet gas produced from the above-mentioned wells.

The sales price of all natural gasoline delivered pursuant to this agreement shall be the average

	Acct. No.	Debits	Credits
Processing Charge from Others	81106-4001	6,572.60	
Natural Gasoline Sales	71001-4001		$20,259.41
Propane Sales	71003-4001		421.31
Dry Gas Sales (To Signal)	71005-4001		1,265.12
" " " (To Producers)	71005-4001		20.96
—2—			
Royalty Expense	71009-4001	1,836.70	
General Petroleum Corp.	50200		108.32
Superior Oil Co.	50200		221.24
Richland Oil Co.	50200		28.35
Catherine McKenna—12½% of	50200		4.05
D. D. Dunlap	50200		249.64
Nelsons-Associates	50200		381.33
Progressive Oil Co.	12501		15.42
Richfield Oil Corp.	50200		97.43
Walter J. Scott	50200		10.22
Deferred Credits	59000		714.70
—3—			
Royalty Expense	71009-4001	5,574.43	
Signal Oil and Gas Co.	50200		5,574.43
54,226 Gals. of 28.0 V.P. Natural Gasoline @ .1028 per Gal. del'd by Signal Oil & Gas Co. for Acct. of Bankline to Std. Oil			

Bankline Oil Company
Signal Hill—Gas Royalty
December 1954

[Copied from Bankline Oil Co. books to support Journal Voucher #1270]

R.2 3/6/57

Producer	Lease	Well No.	M. C. F. Wet Gas Produced	Wet Gas Delivered to Others for Processing Factor: 1.3843872	Plant, Fuel, Shrinkage & Line Loss .3819984	Returned to Lease	Sales Excess	Royalty Rate %	Due Producers Bankline	Less Royalty in Kind	Dry Gas Dry Gas M C F		Royalty Excess Amt.	Gasoline Royalty	Propane Royalty	Total Royalty
Gen Pet Corp	B & S	1-2	2,110	2,921	1,079	248	1,594	50	797	631	5/24 166					
"	Clock	1-2-4&5	1,476	2,043	552	132	1,359	50	680	538	142					
"	"															
"	Jones	4-5	2,340	3,239	1,372	283	1,584	50	742	627	165					
"	Signal	2	1,902	2,633	883	164	1,586	50	793	628	165					
"	K & H	1-5-8	1,801	2,493	1,092											
"	"	2-6-9	2,011	2,785	1,375											
"	"	3-7-10	1,722	2,384	1,135	491	3,569	50	1,785	1,785						
Gen Pet Proportion										4,209					$108.32	$108.32
Bankline Proportion											638	.16c	$102.08	$600.14	12.48	714.27
Superior Oil	Britton	1-2-4	309	428	107											
"	Crew	1-2-4	402	642	161											
"	Miller	1-2	463	641	160											
"	Swaffield	1-2	183	253	63		1,473	100@.145	1,473		1,473	.145c	213.59		7.65	221.24
Richland Oil Co.	B & G	7	70	93	37		60	60	36		36	.16c	5.76	26.11	.53	32.40
Macrate Oil Co.	Davis	#1	0	0	0	7	7	100	7		7		1.12			1.12
D. D. Dunlap	Suple	2	171	237	91	158	12	100	12		12		1.92	244.56	5.08	247.72
Nelsons—Assoc.	King Tut	1	924	1,279	489	50	740	50	370		370		59.20	321.46	6.67	387.33
Walter J. Scott		M.K. 2	52	72	10	23	39	50	20		20		3.20	6.89	.13	10.22
Progressive	Kingsland	7	52	72	14	170	112	100	112		122		17.92	15.11	.31	2.50
Richfield Oil	Scoco	1	129	179	68	0	111	50	56		56		8.96	86.66	1.81	97.43
Bankline Shrinkage over under allowable					132		132									
Totals			16,179	22,398	8,556	1,726	12,116		6,631	4,209	2,462		$371.83	$1,300.93	$142.98	$1,815.74

Bankline Oil Company
Signal Hill—Gasoline and Propane Royalty
December, 1954

[Copied from Bankline Oil Co. books to support Journal Voucher #1270]

R.2 3/6/57

Producer	Lease	Well No.	Wet Gas Produced M. C. F.	Gasoline Content 6 P.M.	Theoretical Production Gallons	Gasoline 1.1739023 88.0 V. P. Gallons	Propane .0567638 Gallons	Royalty Rate Per Cent	Less: Gasoline Royalty in Kind Gallons	Bankline 5/24th Gasoline Royalty Gallons	Propane Royalty Gallons	Royalty Value Gasoline 1028	Propane .0441996
Gen Pet Corp	B & S	1-2	2,110	9.53	20,108	23,599	1,141	33½	7,866	6,227	1,639	380	$ 168.43	$ 16.80
"	Clock	1-2-4 & 5	1,476	5.98	8,826	10,350	501	"	3,453	2,734	715	380	73.91	7.30
"	"							"						
"	Jones	4-5	2,340	11.48	26,863	31,526	1,525	"	10,509	8,320	2,189	508	225.03	22.45
"	Signal	2	1,902	8.33	15,844	18,595	899	"	6,198	4,907	1,291	300	132.71	13.26
"	K & H	1-5-8	1,801	11.99	21,594	25,343	1,226	"	8,448	8,448		409		18.08
"	"	2-6-9	2,011	14.00	28,154	33,041	1,598	"	11,014	11,014		533		23.56
"	"	3-7-10	1,722	13.37	23,023	27,020	1,307	"	9,007	9,007		436		19.27
Superior Oil	Britton	1-2-4	309	7.72	2,385	2,799	135	33⅓	933	933		45		1.99
"	Crew	1-2-4	464	7.02	3,257	3,822	185	"	1,274	1,274		62		2.74
"	Miller	1-2	463	4.71	2,181	2,560	124	"	853	853		41		1.81
"	Swaffield	1-2	183	7.11	1,301	1,527	74	"	509	509		25		1.11
Richland Oil Co.	B-G	7	70	7.71	540	634	31	40	254			12	26.11	.53
D. D. Dunlap	Suple	2	171	23.71	4,051	4,758	230	50	2,379			115	244.56	5.08
Nelsons-Assoc.	King Tut	1	924	8.65	7,993	9,381	454	33⅓	3,127			151	321.46	6.67
Walter J. Scott		M.K. 2	52	2.20	114	134	6	50	67			3	6.89	.13
Progressive	Kingsland	7	52	4.80	250	293	14	50	147			7	15.11	.31
Richfield Oil	Scoco	1	129	11.14	1,437	1,636	82	50	843			41	86.66	1.81
Totals			16,179		167,924	197,076	9,532		66,881	54,226	5,838	3,235	$1,300.93	$142.98

[In margin: Bankline 59.89 3/24 12.48 G. P. 47.41]

Gaso. Deliveries Signal a/c Bankline:	V. P.	Gallons	Price	Amount
Std a/c G. P. Royalty	28.0	54.226	.1028	$ 5,574.43
Std Oil #595	28.0	142,850	.1028	14,684.98
Total Dec., 1954, Deliveries	28.0	197,076	.1028	$20,259.41

Propane Sales			
Signal Oil & Gas Co.	9,532	.0441996	$ 421.31

Gen. Petr. Royalty Gasoline in kind	V. P.	Gallons
Royalty—Gen Petr	28.0	56,495
V —Superior		3,569
Less Bankline's Proportion		5,838
Del'd a/c Gen Petr Dec., 1954	28.0	54,226

Bankline's 5/24th Propane	Amount
Black & Signal	$ 3.50
Clock	1.54
Jones	4.68
Signal	2.76
Total	$12.48

EXHIBIT NO. 8-B

Wet Gas Royalty Statement

Signal Oil and Gas Company
811 West 7th Street, Los Angeles 17, California

Lease or Well Bankline Oil Company

Month of December, 1954

Gasoline and Other Liquid Products	Gasoline	Propane	Total
Wet Gas Received—MCF	28.0		
Content by Test—Gals/MCF			
Theoretical Gasoline Volume—Gals (test x Wet Gas)			
Production—prorated on theoretical gasoline	197076	9532	
Royalty Portion 100%	197076	9532	
Weighted Average Price Per Gallon	.070236975	.0279176	
Royalty Value	$13,842.02	$266.11	$14,108.13
Wet Gas Received—MCF Dry Gas		21656	
Deductions			
Plant Shrinkage, 35 cu. ft./gal	6217		
Operation and Losses	1597		
Return to Lease	1726		
Total Deductions		9540	
Dry Gas Sold or Excess Purchased		12116	
Royalty Portion 100%		12116	
Weighted Average Price Per MCF		.16	
Royalty Value			$ 1,938.56
Total Gasoline, Other Liquid Products and Dry Gas Royalty			$16,046.69

			Total Royalty		
V	Royalty Distribution:	Interest	Amount	Deductions	Net Credit
3	Bankline Oil Co.	100	$16,046.69	*$673.44	$15,373.25

* Available for delivery to General Petro. Corp.
4209 M.C.F. @ $.16

Dry Gas Charges

Excess Dry Gas Purchased M.C.F. @ $ Per M.C.F. $

EXHIBIT NO. 8-C

Invoice

Signal Oil and Gas Company
General Offices: 811 West Seventh St., Los Angeles 17, Calif.

Sold to Bankline Oil Company
437 South Hill Street
Los Angeles 15, California

Date December 31, 1954
Our Inv. No. #G-12009

Natural gasoline delivered to Standard Oil Company for your account from our Signal Hill Plant #2 during the month of December 1954:

197,076 Gals. 28.0 V.P. @.1028.....$20,259.41

EXHIBIT NO. 8-D

Date	Cash Voucher		Our P O No	Credits	Balance
12/31	1217	31	G-12009	20259	20259 41

Detach This Statement Before Depositing Check

Endorsement of check hereto attached will constitute the payee's receipt to Bankline Oil Company in full settlement of the bills noted hereon and it is agreed that it shall not be otherwise applied.

EXHIBIT No. 8-E

Oil Settlement Statement

Standard Oil Company of California
Pipe Line Department — Accounting Division
225 Bush Street, San Francisco 20, Calif.

Producer and Distribution: Sig Hl Signal Oil Gas Co.,
Plant 2 1 Signal Oil & Gas Co 36113 1

Month of: 1 Dec. 1954.

Detail of Runs: (Crude Oil in Barrels of 42 U. S. Gallons. Gasoline in U. S. Gallons.)

Day	Ticket Number Reference	Gross Quantity at 60° *	Net Quantity	Price	Gravity Vapor Pressure	Value
1	391628	4622500	4622500		28.1	
2	391629	4487400	4487400		28.1	

3	391638	4438600	4438600		28.0			
4	391647	4434900	4434900		28.1			
5	391650	4542300	4542300		29.0			
6	391657	4493500	4493500		28.5			
7	391669	4620500	4620500		27.0			
8	391670	4642000	4642000		27.2			
9	391935	434200	434200		27.2			
10	391940	3133100	3133100		27.5			
11	391950	5060900	5060900		27.9			
12	391953	5207400	5207400		27.8			
13	391965	5090900	5090900		28.0			
14	391968	4952100	4952100		27.2			
15	391972	4841100	4841100		27.8			
16	391973	4671300	4671300		27.7			
17	391741	4783300	4783300		28.3			
18	391676	4868500	4868500		27.7			
19	391686	4918800	4918800		28.0			
20	391688	4855900	4855900		28.0			
22	391699	4886600	4886600		28.0			
23	391715	4702600	4702600		28.3			
24	391716	4700700	4700700		27.9			
25	391987	4648000	4648000		28.3			
26	392000	4781600	4781600		29.0			
27	391755	4517300	4517300		29.0			
28	391765	4608700	4608700		27.5			
29	391772	4704900	4704900		28.0			
30	391778	4654800	4654800		28.5			
31	391797	4802800	4802800		28.2			
30	391691	4948100	4948100		27.6			
		141055300	141055300					
Less a/c G.P. Exch. 475A			5422600					
Less a/c Bankline Exch. 595			14285000					
			121347700	.1028	26.0	124	745	44
			28,89231 Bbls.					

EXHIBIT No. 8-F

Payment statement

Standard Oil Company of California
Pine Line Department — Accounting Division
225 Bush Street, San Francisco 20, Calif.

361 Plant 2 ..... $124,745.44

The items listed are covered by enclosed check, endorsement of which will be accepted as receipt in full. If in question please write to the above address.

Signal Oil & Gas Co.,
P. O. Box 17126,
Foy Station,
Los Angeles 17, Calif.

	Total Amount
Month of: Dec., 1954	$124,745.44

EXHIBIT No. 9

On motion made by Martin Weil, seconded by S. A. Patterson, the following resolution was unanimously adopted:

Resolved that the action of the officers in selling to Signal Oil and Gas Company as of November 1, 1952, all of the right, title and interest of this corporation in and to State Lease PRC 421 at Elwood, California, and the Bishop tank farm and sea loading line at Elwood, California, for a consideration of $25,000.00, be and the same is hereby ratified and approved.

Resolved Further that the action of the President and Assistant Secretary in executing a letter

agreement with Signal Oil and Gas Company dated October 29, 1952, transferring all of Bankline's right, title and interest in and to said properties and in executing assignments of all leases and agreements relative to operations in said area, be and the same is hereby ratified and approved.

On motion made by Martin Weil, seconded by S. A. Patterson, the following resolution was unanimously adopted:

Resolved that the action of the officers of this corporation in selling to Signal Oil and Gas Company as of November 1, 1952, the gasoline extraction plant of this corporation located on Willow Street in the City of Signal Hill, together with the land, structures, facilities, pipe, meters and fittings used in connection with the operation of said plant for the sum of $25,000.00, be and the same is hereby ratified and approved.

Resolved Further that the action of the President and Secretary of this corporation in executing a letter agreement with Signal Oil and Gas Company dated October 29, 1952, a grant deed dated November 1, 1952, covering said property and a bill of sale and assignment dated November 1, 1952, covering equipment, facilities, pipe, meters and fittings used in connection therewith, be and the same is hereby ratified and approved.

On motion made by Martin Weil, seconded by S. A. Patterson, the following resolution was unanimously adopted:

Resolved that the action of the officers of this corporation in selling to Signal Oil and Gas Company as of November 1, 1952, all contracts for the treatment of wet gas at its Signal Hill Gasoline Extraction Plant for the sum of $85,000.00, payable in 20 monthly installments of $4,000.00 each, payable on the 25th day of each and every month commencing on the 25th day of December, 1952, and one installment of $5,000.00 payable on the 25th day of August, 1954, plus other sums determined in the manner set forth in that certain letter agreement dated October 29, 1952, be and the same is hereby ratified and approved.

Resolved Further that the action of the President and Assistant Secretary in executing a letter agreement with Signal Oil and Gas Company dated October 29, 1952, covering said transaction and assignments of said gas contracts be and the same is hereby ratified and approved.

On motion made by Martin Weil, seconded by S. A. Patterson, the following resolution was unanimously adopted:

Resolved that the action of the President and Assistant Secretary in entering into an agreement with Signal Oil and Gas Company dated December 1, 1952, for the purchase of all natural gasoline extracted by Signal from wet gas processed by it under the provisions of said letter agreement dated October 29, 1952, at the average price received by

Signal for natural gasoline in the Signal Hill Oil Field, be and the same is hereby ratified and approved.

The undersigned, B. L. Arms, hereby certifies that he is the duly elected, qualified and acting Secretary of Bankline Oil Company, a California corporation; that the foregoing are true and correct copies of resolutions duly adopted by the Board of Directors of said corporation at a meeting thereof duly held on December 3, 1952, at which meeting a quorum of said Board was present and at all times acting, and that said resolutions have not been modified or rescinded and are at the date of this certificate in full force and effect.

In Witness Whereof, the undersigned has executed this certificate and fixed the corporate seal of said corporation this 5th day of November, 1957.

[Seal and Signature Indistinguishable.]

EXHIBIT No. 10

Assignment

For and in Consideration of the sum of One Hundred Dollars ($100.00) and other good and valuable consideration, Bankline Oil Company, a corporation, does hereby sell, assign, transfer and set over to Signal Oil and Gas Company, also a cor-

poration, all its right, title and interest in, to and under the following described instruments:

(a) Contract for the treatment of wet gas, dated June 15, 1936, by and between Bankline Oil Company and Jet Oil Company.

(b) Contract for the treatment of wet gas, dated December 1, 1950, by and between Bankline Oil Company and M. K. Doumani.

(c) Contract for the treatment of wet gas, dated December 6, 1932, by and between Bankline Oil Company and D. D. Dunlap.

(d) Contract for the treatment of wet gas, dated June 9, 1922, amended May 17, 1927, by and between Bankline Oil Company and General Petroleum Corporation.

(e) Contract for the treatment of wet gas, dated October 1, 1938, by and between Bankline Oil Company and Incorporated Production Co.

(f) Contract for the treatment of wet gas, dated January 1, 1952, by and between Bankline Oil Company and Progressive Oil Company.

(g) Contract for the treatment of wet gas, dated March 15, 1934, by and between Bankline Oil Company and William C. McDuffie, as Receiver of Richfield Oil Company of California.

(h) Contract for the treatment of wet gas, dated May 25, 1925, by and between Bankline Oil Company and The Superior Oil Company.

Executed this 1st day of November, 1952.

BANKLINE OIL COMPANY,

By /s/ L. L. AUBERT,
President, and

LUCILLE PYLE,
Assistant Secretary.

Filed at Trial November 25, 1957, T.C.U.S.

In the Tax Court of the United States

Docket No. 60671

BANKLINE OIL COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

TRANSCRIPT OF PROCEEDINGS

Monday, November 25, 1957

The above-entitled matter came on for hearing, pursuant to notice to the parties, at 12:00 o'clock noon.

Before: Honorable Graydon G. Withey,
Judge Presiding.

Appearances:

MELVIN D. WILSON, ESQ.,
621 South Hope Street,
Los Angeles 17, California,
For the Petitioner.

MELVIN H. WILSON, ESQ.,
621 South Hope Street,
Los Angeles 17, California,
For the Petitioner.

E. C. CROUTER, ESQ.,
Assistant Regional Counsel, by
MARK TOWNSEND,
1135 Subway Terminal Building,
Los Angeles, California.

The Court: Call the next docket.

The Clerk: 60671, Bankline Oil Company.

The Court: Will counsel state their appearances?

Mr. Townsend: Mark Townsend for the Respondent.

The Court: Will you state your appearance?

Mr. Wilson: Melvin D. Wilson for the Petitioner, and Melvin H. Wilson for the Petitioner.

The Court: What is the last name?

Mr. Wilson: Melvin H. Wilson, your Honor.

The Clerk: I believe only Mr. Melvin D. Wilson is of record. I will need your appearance, Mr. Wilson.

The Court: As I understand, there is a fact stipulation in this case?

Mr. Townsend: Yes, your Honor. Would you like it offered at this time?

The Court: Yes. Do you have some attached stipulations?

Mr. Townsend: Yes, your Honor.

We have a stipulation of facts with ten exhibits attached, which I herewith offer.

The Court: Is there an objection?

Mr. Wilson: No.

The Court: It may be received with the designated exhibits.

(Petitioner's-Respondent's Exhibits Numbers 1 to 10, inclusive, were marked for identification and were received in evidence.)

The Court: Now, if there is nothing else preliminary, I will hear the opening statement.

Mr. Wilson: If the Court please, the only question in this case is whether the taxpayer is entitled to get capital gains treatments on two items in 1952 under a contract, an $85,000 item and an $11,000 item.

The Petitioner contends that these amounts were received for the sale of casing-head gas contracts, and the Government contends that they received $85,000 as a bonus for giving Signal Oil and Gas Company a job of processing gas from these contracts.

The Petitioner had a casing-head gas plant in the Signal Hill oil field near Los Angeles. It had but eight gas purchasing contracts, enough to make a

little profit, but not enough to make a large profit from that plant, and the Signal Oil and Gas Company had in that same field a casing-head gas plant, and sufficient gas contracts to make a successful operation.

The parties had some common interests up near Santa Barbara, California, the Elwood field, where they had some common interests in pipe-line, a pier, and some tanks, and then Petitioner also had a small oil lease up there.

So, the president of Petitioner and vice-president of Signal knew each other, and met from time to time and discussed their common problems up north, and the situation down here, and they gradually evolved a deal whereby Signal would buy the casing-head gasoline plant here, and the contracts, casing-head gas contracts, and the Petitioner's interests in that pier, pipeline, tanks, and oil lease up near Elwood for a lump sum of $135,000, plus further amounts to come out of production of these casing-head gas contracts down here.

Then Petitioner, or then Signal, wishing to know how to allocate this $135,000 between intangible and tangible interests, asked Petitioner to allocate it to make it allocated by the contracts, and Petitioner didn't, wasn't too interested, and didn't particularly make appraisal between the assets, so it said give us an indefinite amount allocated to these casing-head gas contracts that will be treated as capital gains.

So, Signal did that. Now, under these casing-head gas contracts that were sold, and subject of

this controversy, Petitioner had to pay to the oil producers who produced the wet gas that was being processed, had to pay to those underlying producers 42½ per cent of the value of the gasoline and the propane and the dry gas sold.

Now, Signal did not assume that underlying royalty obligation, but took over Petitioner's equity, as I call it, in the contract, and agreed to pay Petitioner 70 per cent of the value of the gasoline and the propane, and all the dry gas, and Petitioner then was to pay the underlying royalties, and to keep 27½ per cent, the difference between 70 and 24½ per cent.

The Petitioner would keep that 27½ per cent. So, this deal was executed along that line, $85,000 being allocated to these contracts, and $50,000 to the tangible assets, and Signal took over the plant, casing-head gasoline plant, and salvaged it, and then processed these contracts through its own plant thereafter.

Now, of course, Signal didn't have to build the plant, so it could afford to pay a pretty good price for these casing-head gas contracts. This gas was settled in a field, and very rich, producing about, at that time about 750,000 cubic feet of wet gas a day, which produced about nine gallons of gasoline per thousand cubic feet, so that it would figure up to be worth several hundred thousand dollars, depending upon how long it would last.

Incidentally, the average of the richness or quality of wet gas in the state was about two and a half gallons per thousand cubic feet. This had nine.

Petitioner wanted to buy back that gasoline that was produced, because it wanted to blend it with its other gasoline or refined products. Signal didn't care, because it sold all of its gasoline that it made, anyway, so it agreed to sell back to Petitioner.

In the fall of 1957, Petitioner had an excess of gasoline it didn't need for blending purposes. It asked Signal to cancel that gasoline purchasing contract, and Signal did sell. The only consideration to this case that Petitioner gave was whether it would press its case. It did not do it for this case, but it wouldn't have done it if it hurt the case.

Signal is now selling this gasoline producing from these casing-head gas contracts to Standard Oil Company as it sells the rest of its products.

Now, Petitioner's books have erroneously recorded this transaction in the operations under this contract. The books showed that the gasoline was made from the contracts that had been transferred to Signal was Petitioner's gasoline, and Signal was simply doing a processing job for Petitioner on a gallon basis. This was contrary to the contracts, and to the resolution of the Board and to the assignment of the contracts, and to the testimony of the negotiating officers. The testimony will show that these books were so kept because Petitioner had to pay its royalty to the wet gas producers on the basis of 100 per cent of production.

Petitioner reported this $85,000, this capital gain, from the sales of its business, and reported the $11,000 as ordinary income, but now claims that everything was capital gain.

I think the testimony will show that they always are talking about the sale of these casing-head gas contracts, and not about giving Signal a job, and giving it a bonus for that job.

Mr. Townsend: If the Court please, in this case involving the year 1952, the Commissioner has determined a deficiency in income tax in the amount of $14,342.52, and Petitioner claims an overpayment in the amount of $10,688.30.

The facts are that as of November 1, 1952, Petitioner owned a casing-head gas plant and pipelines located in the Signal Hill oil field, California. Prior to that date, Petitioner had entered into certain contracts for the acquisition of wet or casing-head gas from various oil producers, from leases held by such producers on land located in Signal Hill oil field.

Petitioner was engaged in the business of processing such gas and selling the processed products, which consisted of natural gasoline, propane gas, and dry gas.

The Petitioner had entered into most of such contracts in earlier years, and was paying the producers royalties averaging approximately 40 per cent of the amounts received from the natural gasoline, propane, and dry gas. By 1952, the going rate of royalties for such products under similar contracts was approximately 65 per cent, so that Petitioner had a differential of about 25 per cent, as compared with current acquisitions of similar contracts.

Signal Oil and Gas Company also operated a casinghead gas plant in the Signal Hill oil field, and was engaged in the same business as Petitioner.

On November 1, 1952, Signal purchased Petitioner's oil and gas plant, and, thereafter, dismantled the plant while continuing to operate its own plant.

On the same date, November 1, 1952, Petitioners entered into an agreement with Signal Oil and Gas Company whereby Signal was to process the gas under the contracts Petitioner had previously entered into with various producers.

Under the terms of this agreement, Signal was to process all the casing-head gas under the contracts, sell the finished products, and pay over the proceeds of such sales to Petitioner, less processing charges.

This agreement, in form a purchase and sale agreement——

The Court: What do you mean by "processing"?

Mr. Townsend: Your Honor, that is more or less of a technical process whereby wet, or casing head, gas is taken right from the well and run through a plant and through a series of machines and refining changes to whereby the three different products are produced: Natural gasoline, propane, and dry gas.

The Court: Is that synonymous, then, with refining?

Mr. Townsend: I do not believe so, your Honor. I think refining is another step further on. I think

we will have some experts here today that can give a pretty good description of the various steps.

This agreement, which was, in form, a purchase and sale agreement, provided that Signal would pay $85,000 to Bankline purportedly as consideration for the purchase of such gas contracts. The payment was effected by an installment note dated December 1, 1952, bearing no interest, promising to pay the $85,000 in twenty monthly installments, commencing on December 25, 1952.

On the same date as the other agreements; namely, November 1, 1952, Signal and Petitioner entered into another agreement, also in the form of a purchase and sale, under the terms of which Petitioner purportedly purchased all the natural gasoline produced by Signal.

The evidence will show that the operations between Petitioner and Signal were carried on in the following manner:

(a) With respect to the natural gasoline produced, this was delivered for the account of Petitioner and at Petitioner's instructions, and this was by far the most valuable product that was processed. Signal billed Petitioner for the total amount produced, and Petitioner remitted this amount to Signal. Signal then deducted its processing charges from this amount, and returned the remainder to Petitioner.

(b) The liquid propane was produced and sold by Signal, and the amounts received from such sales, less Signal's processing charge, were remitted to Petitioner.

(c) The dry gas, in excess of that returned to leases, and used in plant operations, were sold by Signal, and the total amounts received from such sales were remitted to Petitioner, as Signal did not charge for processing the dry gas.

The Petitioner remained liable for the royalty payments under the gas contracts with the producers, and actually paid those royalties over the years, though payments to some of the producers were made by deliveries in kind. These royalties were paid by Petitioner out of the amounts remitted by Signal Gas Company.

There are two amounts in issue in this trial for the year 1952; first is to decide the nature of the $85,000 payment received by Petitioner under the contract with Signal; and the second is to decide the nature of the $11,293.87, which is the net amount retained by Petitioner after the payment of the royalties.

Petitioner reported the $85,000 on its 1952 return as long-term capital gain, and the $11,351.42 as ordinary income.

Petitioner here contends that it sold the gas contracts to Signal; that those contracts have been held for more than six months, and that, therefore, the $85,000 and the $11,293.87 represent long-term capital gain.

While the net amount retained by Petitioner under the two months of operations in the year 1952 was only $11,351.42, this is a continuing issue which involves hundreds of thousands of dollars in the years after 1952.

The Respondent has determined that all the amounts received by Petitioner represent ordinary income. Respondent contends, first, that no sale or exchange has taken place. Petitioner has not, or has failed to cut all the strings in this case.

The Respondent contends that Petitioner merely farmed out the processing to Signal. This is illustrated by the natural gasoline operations, and, again, the natural gasoline represents approximately 90 per cent of the total value of all the products involved, and Petitioner had the same control over that natural gasoline as it had when it handled its own processing. The only money involved in this natural gasoline operation was the Petitioner's. Thus, Petitioner paid Signal for the natural gasoline produced, Signal deducted its processing charges, and returned the balance to the Petitioner.

Obviously, these natural gasoline operations could have been handled by the Petitioner by paying the processing charge to Signal, rather than following the procedure of transferring funds from one pocket to the other. Those gasoline products were disposed of by Petitioner in the same manner as similar products were produced and sold by Petitioner in the regular course of its business.

With respect to the propane and dry gas products, Respondent contends Signal merely acted as an agent for the Petitioner in selling the products and turning over the receipts, less their processing charges for propane to the Petitioner.

Respondent further contends that Petitioner did not dispose of the capital asset; all that Petitioner

assigned to Signal was the right to process the gas under the contracts. Petitioner received the proceeds from the sale of the products, and made the royalty payments under the contracts. The right to process the gas, while it may constitute property, is not a capital asset because it is only a contingent right to receive compensation for services to be performed in the future.

As there was no sale or exchange of capital assets, the percentage provision of Section 117 of the 1939 Code is not applicable, and the amounts in issue, therefore, constitute ordinary income.

Now, in the alternative, Respondent contends that if anything was sold under these transactions, it amounted to a mere resale of raw materials which was the wet casing-head gas, and Bankline acted as the middle man. Such materials would not be held for six months, and in view of the magnitude of the operations, they were actually held for sale to customers in the ordinary course of Bankline's business.

The Court: Call your first witness.

Mr. Wilson: Mr. Green.

RUSSELL H. GREEN

was called as a witness by and on behalf of the Petitioner, and, having been first duly sworn, was examined and testified as follows:

The Clerk: Please be seated. Please state your name and address.

The Witness: My name is Russell H. Green; my address is 811 West 7th Street, Los Angeles.

(Testimony of Russell H. Green.)

Direct Examination

By Mr. Wilson:

Q. What is your occupation?

A. I am executive vice-president of the Signal Oil and Gas Company.

Q. Were you, in the fall of 1952, a vice-president of Signal Oil and Gas Company? A. I was.

Q. Will you please explain the operations of casing-head gasoline plants?

A. A casing-head gasoline plant is a plant which came into existence because of the fact that when oil is produced from an oil field, it produces, along with—or, rather, gas and other hydrocarbons are produced along with it, and brought to the surface. The gas, as we know it, is separated at the surface of the ground in a trap, which is simply a mechanical means of separating the oil which is going to be shipped, probably, to refineries from the volatile matters, or the gas which is not going to the refinery.

Now, that gas, because of its condition of pressure and, in some respects, due to the gravity of the crude, has certain fractions in it which can be extracted. The gas that comes from the trap is commonly known as wet gas, and that wet gas is taken from the trap through pipe-lines to a plant which is installed for the purpose of taking out the so-called wet gas those fractions which can be utilized in another manner, and the gas coming from

(Testimony of Russell H. Green.)

the plant, now known as dry gas, is usually sold to a gas company or used for burning in the boilers.

The gas, wet gas, going into the plant, is put through a series of towers, over which oil is pumped, the gas coming into the bottom of the tower. Oil, the absorption oil, is something like kerosene, pumped into the top of the tower.

As the oil mingles with the gas, the gas processing goes vertically through the tower, and the oil coming down through the tower, the absorption oil absorbs out these hydrocarbon fractions, and the gas coming off the top of the tower is known then as dry gas. The absorption oil containing the hydrocarbon fractions is put through a distillation system, so that the hydrocarbon fractions are distilled off the absorption oil; and then can be re-used, and the hydrocarbons are separated, usually, into—and depending upon what you want to do—propane, butane, and what we call natural gasoline.

Natural gasoline, ordinarily, is considered, sometimes thought of as 26-pound vapor pressure, but that can be changed, depending on how and what basis you operate your gasoline plant, so that at the plant, then, you make the gas, you cause the gas to become dry gas, and then you have the resultant products, which can be propane, butane, and what we call natural gasoline.

Mr. Wilson: May I see the stipulation just a moment? Where are the documents; are these the documents?

(Testimony of Russell H. Green.)

The Clerk: Yes.

Q. (By Mr. Wilson): Mr. Green, I will show you some of the exhibits to the stipulation which has been filed in evidence in this case. Here is one dated October 29, 1952, called Exhibit 1. Just for the sake of the record, I will say this one has to do with the fixed or tangible assets, and Exhibit 3 is also dated October 29, 1952, and this has to do with the casing-head gas contracts.

You are familiar with those? A. Yes.

Q. Did you handle any of the negotiations leading up to the execution of these two contracts?

A. Yes, I did. You might say that I initiated them.

Q. Will you state to the Court the principal steps in the execution of these contracts?

The Court: You mean execution, or——

Q. (By Mr. Wilson): The negotiation and execution of the contracts.

A. Well, I had known Mr. Aubert, president of Bankline, for many, many years. We have seen each other, and as Signal Hill declined from its peak production, it became evident that certain of the gasoline plants were no longer—would sooner or later reach the point that they no longer would be economic; and I had suggested to Mr. Aubert that on several occasions that if he did reach the point where his plant was no longer economic, that we would like very much to consider buying his gas contracts, taking over his plant on some basis.

His answer to me, several times, was, well he rec-

(Testimony of Russell H. Green.)

ognized their production had dropped considerably, but they had a number of operators and men who were working the plant who were oldtimers of Bankline, and they would hang on as long as they could, and if they ever got to the point that he would consider it, he would let me know.

We also were operating—rather, shipping oil that we had at Elwood; that is, Signal Oil and Gas Company had leased at the west end of Elwood Field, shipping the oil through a marine loading plant that the Bankline Oil Company had at Elwood, which consisted of two 80,000-barrel tanks a marine line which went out into the ocean, so the tankers could come up and take away a tank load of oil at a time, and we, Signal, together with some other companies up there, Honolulu, Bankline itself, which had a small lease, shipped our oil into these 80,000-barrel tanks, and the Bankline arranged the routing of tankers that came to take the oil from those 80,000-barrel tanks.

One day, Mr. Aubert called me and wanted to know if we could have lunch together, as I recall it, and it developed that he would consider making a deal on this gas at Signal Hill at the same time, if we would consider the purchase of the tanks in the marine loading facilities at Elwood; the reason being on his part that the production from his own lease was practically zero; the Honolulu lease had been abandoned, and that only oil going through there came from Signal property, practically the only oil, and, since he was handling that oil on a

(Testimony of Russell H. Green.)

five-cent-a-barrel through charge, it had gotten to the point that, with the maintenance problems and things that he had, that it was questionable that he could continue to operate that station.

We were concerned—I was concerned, because, since we had the majority of the oil of that Elwood, if, for some reason, the loading line was no longer used, was shut down, or was not maintained in the proper fashion, we would be the ones that would suffer, since, if the loading line was put out of commission, we would have to truck our oil, or do something different with it; so I was very interested in the problem of the tanks at Elwood, and the gas at Signal Hill, which I talked to him about. We talked about the matter.

I had talked to Mr. Heath, R. W. Heath, who was vice-president of our company in charge of our gasoline department, and the upshot of it was that we negotiated with Mr. Aubert, and arrived at a price of $135,000, which was to cover the purchase of that gas contract at Signal Hill, the purchase of that gasoline plant, the purchase of the land at Signal Hill on which the plant stood, the purchase of their interest in these tanks, their interest in the loading line at Elwood, the oil, their interest in the oil lease they had, which consisted of four very small wells, and whatever right-of-ways and facilities went along with that operation.

As part of that operation, Bankline was—well, I think I have answered your question to the point.

(Testimony of Russell H. Green.)

Q. Did Signal Oil and Gas Company have a casing-head gas plant in this Signal Hill oil field?

A. Yes, we had built the first plant in Signal Hill.

Q. Now, you mentioned the total price was to be $135,000. Of course, the contract is in evidence, but were there any other considerations besides that?

A. In addition to the $135,000 which we paid for the things I have described, Hancock—I mean, Bankline was to receive additional sums which were the difference between what they were paying to the producers of the wells there, which their natural gasoline, gas, came from at Signal Hill, and the amount of money which we fixed on as what we were prepared to pay Bankline.

In other words, we were going to retain approximately 30 per cent of the value of the natural gasoline which we extracted from the gas, and pay the balance to Bankline.

Bankline, as part of that, agreed to take on the problem of the maintenance of the pipe-lines which were necessary, which they had previously installed. They had an extensive system of pipe-lines coming from their wells into a main pipe-line system. That pipe-line system paralleled our place, I think it was on Cherry Street—I've forgotten—and we were to install a master meter whereby we metered the gas coming from the Bankline well at one point. We accounted for it to Bankline, that gas as registered on that meter, and Bankline took on

(Testimony of Russell H. Green.)

the obligation of taking the daily meter readings from the various wells, just like they had been doing, taking it daily, taking it monthly, gasoline checks, and, more important still, maintenance of the pipe-line system, anything that happened to that pipe-line system; and that was one of the things that bothered Mr. Heath and myself, because the pipe-line system, like ours, was very old, and corrosion and things like they are, we were concerned with whether we would be faced with extensive repairs to the old Bankline system.

Q. Did Signal Oil and Gas Company make an appraisal of the assets to be covered by this contract?

A. We made an appraisal as you normally go about it in your company. The deal was not large as we looked at it, but Mr. Heath and I went to considerable length to try to valuate particularly the problem we had at Elwood, and Mr. Heath the problem we had at Signal Hill.

Q. Do you recall about what the production was, that wet gas at Signal Hill, from Bankline's contracts?

A. My recollection of the gas volume was that it was about three-quarters of a million cubic feet of gas. It was exceptionally rich, due to the location of the wells, and the character of the oil. My recollection is, the gasoline content per 1,000 cubic feet was between eight and nine gallons per thousand.

Q. Do you recall the price of wet gasoline, casing-head gasoline, at that time?

(Testimony of Russell H. Green.)

A. Well, it was approximately 8½ cents a gallon, natural; 8.33, I think it was.

Q. Could you give us any idea of what the value of those casing-head gas contracts might be at that time?

A. Well, as we tried to weigh the Signal Hill, it is a very long-life field. The wells, we figured, would last a considerable length of time. One of the handicaps, of course, is that when you negotiate for natural gas, you have no control of the well production because the production is in the hands of operators, and they decide what they are going to do by their oil production, and by their natural gas production.

In other words, to the best of our judgment, we thought a value of $85,000 of the $135,000 to be what we considered the value.

Q. Were you familiar with the going rate of royalties to be paid to producers of wet gas in the fall of 1952? A. I think so.

Q. Would you give us an idea of what was being paid?

A. In original days at Signal Hill, the old gasoline royalties started at about 25 per cent. In about 1952, I would say the going rate was 55 per cent for natural gasoline.

Q. Do you know of any casing-head gas contracts in the southern California area before 1952 which called for a royalty of around 70 per cent?

A. Yes, the Signal Oil and Gas Company negotiated a contract with Huntington Beach, with

(Testimony of Russell H. Green.)

the Southwest Exploration Company, and I think we paid a royalty of 65 per cent. The Signal Wilmington Associates, which took all the gas from the City of Long Beach, Long Beach oil development, close in the harbor, paid a royalty, I think, of 62½ per cent.

Q. Do you recognize this document?

The Court: If you intend to examine the witness relative to that document, will you have it marked for identification?

Mr. Wilson: I would like to mark this for identification, please, Exhibit No. 11.

The Court: It will be the next exhibit.

The Clerk: Exhibit 11 for identification.

(Petitioner's Exhibit No. 11 was marked for identification.)

Mr. Wilson: Thank you.

The Clerk: Exhibits 1 to 10 are attached to the stipulation.

Mr. Wilson: Thank you.

The Clerk: 12 for identification.

(Petitioner's Exhibit No. 12 was marked for identification.)

Q. (By Mr. Wilson): Do you recognize this document? A. Yes.

Q. What is it, please?

A. This is a contract entered into between Signal Oil and Gas Company and the Southwest Exploration Company. It covers the treatment by Sig-

(Testimony of Russell H. Green.)

nal of Southwest's gas in the Huntington Beach Oil field, which covered a great, large number of wells, and a very large amount of production.

The Court: That reference by the witness was to Exhibit 11 for identification.

Mr. Wilson: I would like to offer this in evidence, if your Honor please.

Mr. Townsend: Could I ask if the purpose of the offer is merely to show the royalty per cent paid?

Mr. Wilson: Yes, that is right.

Mr. Townsend: For that limited purpose, I have no objection.

The Court: It may be received for the stated purpose.

(Petitioner's Exhibit No. 11 was received in evidence.)

Q. (By Mr. Wilson): Do you recognize this document?

A. Yes. This is a contract——

The Court: The witness is handed Exhibit 12 for identification.

Mr. Wilson: Thank you.

A. (Continuing): This is a contract between Lomita Signal Wilmington Associates and the Board of Harbor Commissioners, City of Long Beach, and covers their gas from parcels W, X, Y, and Z, usually referred to as the Long Beach Oil Development Company property in the Long Beach Harbor field.

(Testimony of Russell H. Green.)

Mr. Wilson: I will offer this in evidence for the same purpose.

Mr. Townsend: No objection.

The Court: It is received for the same stated pupose as Exhibit No. 11.

(Petitioner's Exhibit No. 12 was received in evidence.)

Q. (By Mr. Wilson): Mr. Green, how did you justify having Signal Oil and Gas Company pay Bankline $85,000 for these gas purchase contracts, plus 70 per cent of the gasoline and perhaps more than that on the propane?

A. It was a matter of evaluation. We looked at the facts in the first place, that we had a large gasoline plant, and that we had excess capacity. We could run this gas through the plant with practically no additional cost.

In the second place, the gas, according to our appraisal, would be there for a long time. It should have a slow decline curve, and should produce for a considerable period of years. We considered, also, the fact that the gas was very rich, between 8 and 9 thousand gallons per thousand cubic feet.

Considering all those factors, we felt that our offer was justified. I think that the past has proved that.

Q. Did you have anything to do with the allocation of the $135,000 as follows: $85,000 for the contracts, and twenty-five for the Signal Hill gasoline plant, and twenty-five for the Elwood assets?

(Testimony of Russell H. Green.)

A. Yes, I did. Actually, in the negotiations, we bought the whole works for the sum of $135,000, and in discussing the matter, however, for our own books, we had the problem, we were buying what amounted to a package deal, including some land and a gasoline plant, and gas contracts, the interest in the tanks at Elwood, and so, discussing with our accounting department, we, for our purposes, wanted to in some way evaluate the different items, and out of it came the figures which we have used and, I think I thereupon asked Bankline, as I recall it, whether they would have any objection to breaking the thing down, and that's the way it came about.

Q. Did you ever discuss with Mr. Aubert, or anybody else on behalf of Bankline, the matter of Signal getting a job of processing Bankline's gas at Signal Hill, paying a bonus for that job?

A. We never discussed any such proposal.

Q. Are you familiar with the contracts of that type, where one processor does a job of processing for another one?

A. Yes, processing agreements are somewhat common, although they vary in character.

Q. Do they differ from the type of contract that we have entered in, for the purpose entered into by Agreement No. 3—Exhibit 3?

A. I would think they differed very basically.

Q. Would you give us some of the differences?

A. A processing contract, from my experience in the gasoline business, is one which the person

(Testimony of Russell H. Green.)

who is having their gas processed, has the right, and usually on very short notice, to discontinue the processing.

It is work that is done on a temporary basis. We have processed gas, but at all times, it is a case in which you, on a short notice, discontinue the processing.

Q. Are there any other differences that you recall?

A. Well, in addition to that, for instance in the case that we have here, where we set our income from this gas at 2½ per cent per gallon, the processing deal would, at least in Signal Hill or in the gasoline business, would be on a much lower scale and processing charges or actually a cent a gallon is usually high, in my experience. It has been somewhere around three-quarters, 85-hundredths of a cent a gallon.

Q. Would that vary with the vapor pressure, or the price of gas?

A. It would vary, but somewhere around a cent has been my experience, as far as processing deals are concerned.

Q. Do you think of any other differences?

A. Primarily, the ability to cancel out on short notice is the essential thing I think of.

Q. Is it customary in oil practices when there is a processing job to be given out, to give or receive a bonus?

A. I have never heard of such a thing.

Q. Do you know to whom Signal is selling the

(Testimony of Russell H. Green.)

gasoline that they process from these former Bankline casing-head gas contracts?

A. Well, we have a contract which covers all gasoline which we produce in the state of California, so that with the Standard Oil Company, who are now taking gasoline.

Mr. Wilson: I have no further questions.

The Court: Cross-examine.

Cross-Examination

By Mr. Townsend:

Q. Mr. Green, how long has your plant been operating in the Signal Hill area?

A. We built it originally in 1921.

Q. I believe you stated that that was more or less in competition with the Bankline plant in the Signal Hill area?

A. Oh, we were in competition with a lot of people in the Signal Hill area; not necessarily Bankline. Bankline was nothing but a small plant.

Q. You were in competition with them?

A. Oh, yes, sure.

Q. I take it at the time of this contract, you were operating at least full capacity?

A. That's correct.

Q. I believe you have already stated it would have been more economical to operate at full capacity; you can run this extra production through at lower cost? A. That's right.

(Testimony of Russell H. Green.)

Q. Was Bankline's plant comparable in any way with your plant?

A. Just how do you mean that? What are you looking at?

Q. For example, would they have very much the same costs or operations?

A. All natural gas absorption plants have the same cost of operation; the Shell, the Signal, the Reservoir Hill gasoline plant, the Signal Hill gasoline plant; they all operated in approximately the same way. Some of them operated different pressure; some of them have weather equipment. Basically, the process is the same, yes.

Q. Now, referring to this note, for $85,000, which is Exhibit 4, were there any extensions on that note? A. I really don't know.

Q. Why is it that no interest was provided on that note?

A. Simply because we arrived at a price of $135,000 and because Signal at that time didn't have $135,000 in their pocket. They asked if they couldn't pay so much down and so much a month.

Q. Without interest?

A. If that is what it is, that's what it is.

Q. Was there any discussion of capital gain treatment on this $85,000 payment at the time of negotiations? A. Not that I recall, no.

Q. You do not recall any? A. No.

Q. When did the discussion first arise, Mr. Green, about the capital gain treatment?

A. I don't know that I was involved in the dis-

(Testimony of Russell H. Green.)

cussion of capital gain. There was a letter signed which indicated we would take on what tax liabilities there were, but that was a matter that our tax people looked at.

Q. You signed that letter, did you not?

A. If I signed the letter, I signed it.

Q. Directing your attention to Exhibit 5, will you see if that refreshes your recollection, Mr. Green? A. Yes.

Q. That letter is dated December 1, 1952?

A. Yes.

Q. So, I take it there must have been some discussion at or about the same time?

A. My recollection is now that when we came, when this question of $135,000, that is, our request to Bankline that they split it up so that it was $85,000 for one, and $5,000 or $25,000 for the others; that, some way or other, Bankline came up with the idea, we were willing to split it, but if they did, there might be a situation as to the tax question, and our tax people said they couldn't see there was any liability involved in that, and that, out of that discussion, apparently, came the letter which is here, that we agreed to indemnify Bankline; that's correct.

Q. In your contract, Exhibit 3, you have set out in there a price of 8.33 cents per gallon for natural gasoline. How would the propane price be determined?

A. I think the propane was at a half cent a gallon.

(Testimony of Russell H. Green.)

Q. Would that be a fluctuating price on propane as in the natural gasoline?

A. My recollection is—but I am not positive—that that fluctuated. I can't say; I don't recall what the contract said.

Q. I show you contract, Exhibit 3. I haven't been able to find any reference to propane.

A. It says "LBG propane," which is 1¼ cents a gallon.

Q. That was Signal's share, was it not?

A. That's right.

Q. Your natural gasoline is based on a present market price set by Standard Oil Company; how would your propane price be determined, or would that not fluctuate?

A. I would say, according to this, it says at the same price, 1¼ cents.

Q. It would remain the same. I believe you testified that in 1952, the going royalty rates with oil producers was about 55 per cent; is that correct?

A. That's my recollection of it.

Mr. Townsend: I have no further questions.

The Court: Anything further?

Mr. Wilson: I would like to ask one question.

Redirect Examination

By Mr. Wilson:

Q. Mr. Green, you stated that the costs of operation of all the casing-head gasoline plants in Signal Hill would be the same?

A. The cost of operations? If I said "cost," it

(Testimony of Russell H. Green.)

was the process was similar, but the cost would not be the same.

Q. Would it vary with the volume?

A. Oh, sure.

Mr. Wilson: That is all.

The Court: You may step down.

(Witness excused.)

Mr. Wilson: Mr. Aubert.

L. L. AUBERT

was called as a witness by and on behalf of the Petitioner, and, having been first duly sworn, was examined and testified as follows:

The Clerk: Please be seated.

Direct Examination

By Mr. Wilson:

Q. Will you state your name and occupation, Mr. Aubert?

A. My name is L. L. Aubert, and I am president of Bankline Oil Company.

Q. Give us your address, too, please.

A. My home address is 401 South Burnside, Los Angeles.

Q. Your office address?

A. 437 South Hill Street, Los Angeles.

Q. Were you president of Bankline Oil Company in the fall of 1952? A. I was.

Q. I believe you have examined the stipulations, or the retained copies of it, and I show you Exhibit

(Testimony of L. L. Aubert.)

1, Exhibit 3, and will you examine those, and see if you are familiar with them?

You are familiar with those? A. Yes.

Q. Did you negotiate those contracts on behalf of Bankline Oil Company? A. Yes.

Q. With whom did you negotiate?

A. With Mr. Green of Signal Oil and Gas.

Q. You heard Mr. Green testify about the negotiations. Do you corroborate what he said about the negotiations of this [33] contract, or do you want to state it to the Court how you saw it?

A. Well, I would state it about the same as Mr. Green had stated it. We negotiated the contracts, and we agreed to sell the facilities and the contracts for a total of $135,000, and retaining such sums as may come out of production from the natural gas.

Now, as to the division of the $135,000, I believe I didn't know too much about that. It was a matter which probably was more helpful to Signal, and the $50,000 for the facilities, and the $85,000 for the natural gas contracts was somewhat their idea, but it was perfectly agreeable to me as long as we got the $135,000.

Q. Did you ever discuss with Mr. Green the matter of giving Signal a job of processing your gas and getting a bonus for it?

A. No. No. I didn't discuss that with anybody, with Signal, for that matter.

Q. Did you ever instruct your accounting department as to the manner in which this transaction and the operations under it would be recorded

(Testimony of L. L. Aubert.)

on your books? A. No. No, I never did.

Q. Did you know until recently how it was handled on the books?

A. I didn't know until, just until this matter came up, and I was shown one of the distribution sheets from our records.

Q. Will you examine Exhibits Nos. 9 and 10 in this stipulation, and while you are at it, I will have you look at Exhibit 8? You have examined that recently, I believe?

A. Yes; I believe I did.

Q. Looking at Exhibit 8, and especially 8-A, do you understand that it shows that in December of 1954, which was taken as a typical month, which was the same as every other month in 1952, it shows that Bankline sold natural gasoline and propane to Signal under the contract called Exhibit 3, and that it charged Signal for the gasoline and propane after allowing Signal a credit for a processing charge.

Is that your understanding of that journal entry?

A. Yes; that is what this would appear to show.

Q. Mr. Aubert, as the chief executive of your company and the officer who negotiated these contracts, does that journal voucher correctly, in your opinion, reflect the transactions under these contracts? A. No; I don't believe it does.

Mr. Townsend: Your Honor, Respondent objects to that question on the grounds it calls for a conclusion from this witness. I do not think the foundation has been laid for his background and,

(Testimony of L. L. Aubert.)

further, I think it is an issue to be decided by this Court.

The Court: Yes; I am inclined to sustain that objection. That is one of the issues leading to a final conclusion of this case.

Q. (By Mr. Wilson): May I ask, Mr. Aubert, if in your opinion that entry conforms to the negotiations that you entered into?

A. It doesn't appear to.

Q. Do you recognize this document?

The Court: Is that an exhibit?

Mr. Wilson: I would like to have this marked for identification, No. 13.

The Clerk: 13 for identification.

(Petitioner's Exhibit No. 13 was marked for identification.)

Q. (By Mr. Wilson): Do you recognize that document? A. Yes; I do.

Q. What is that, please?

A. What did you say, sir?

Q. Will you state what it is, or did you negotiate that document? A. Yes; I did.

Q. Would you explain the background of that negotiation and the execution of that contract?

A. We purchased the natural gasoline from Signal and used that natural gasoline in our blending operations at our refinery at Bakersfield. Due to a change that took place in our operations about June of 1957, we required less natural gasoline than we had contracted to handle, and our natural gaso-

(Testimony of L. L. Aubert.)

line inventory started to accumulate. I looked about for places that we might dispose of natural gasoline, and this was one of the avenues that we thought was possible, so I contacted Mr. Heath of Signal Oil and Gas, and asked him if it would be agreeable with him if we could terminate this agreement wherein Bankline purchased natural gasoline from them, as of October 1, 1957.

He said that that would be fine, that it was all right with him, to just write a letter; so I did, and this is it.

Q. I notice that you had entered into two contracts with Signal, dated December 1, 1952, and this letter does not identify which one you were cancelling. A. The one of December 1, 1952.

Q. There were two contracts dated December 1, 1952.

A. It was the one in which we purchased the gasoline.

Mr. Wilson: I would like to offer this in evidence.

Mr. Townsend: No objection.

The Court: It may be received.

(Petitioner's Exhibit No. 13 was received in evidence.)

(Testimony of L. L. Aubert.)

PETITIONER'S EXHIBIT No. 13

Bankline Oil Company
437 South Hill Street
Los Angeles 13, California

September 30, 1957.

Mr. R. W. Heath, Vice President,
Signal Oil and Gas Company,
811 West Seventh Street,
Los Angeles 55, California.

Dear Ronnie:

This letter confirms the cancellation of our agreement dated December 1, 1952, effective October 1, 1957.

Please indicate your approval on the copy of this letter enclosed herewith and return it to us for our records.

Very truly yours,

/s/ L. L. AUBERT,
President.

LLA:LL

Accepted and Approved this 9th day of October, 1957.

SIGNAL OIL AND GAS COMPANY,

By /s/ P. W. HEATH.

Admitted in evidence November 25, 1957.

(Testimony of L. L. Aubert.)

Q. (By Mr. Wilson): Mr. Aubert, in negotiating for and executing that contract, did you give any consideration to this tax case?

A. On the cancellation?

Q. Yes.

A. Well, I didn't know whether it would affect our status or not, and I asked Mr. Weil whether the cancellation of this agreement would affect us in any way, and he said he didn't think so.

Q. Did you, about this date in the fall of 1957, cancel any other casing-head gasoline purchase contracts?

A. Yes; we did. Lomita Gasoline Company treats some gas for us, and, heretofore, we had taken our royalty natural gasoline in kind, for use in our refinery, and on September 1, I wrote them terminating our election to take our natural gasoline in kind.

Q. Any others?

A. So, it took that one out of the way. We have an agreement to purchase natural gasoline from the Sun Ray Mid-Continent at Newhall, and on October 1, I negotiated a deal whereby we would resell that to the General Petroleum Corporation.

Mr. Wilson: No more questions.

The Witness: We are trying to reduce inventory on natural gasoline.

The Court: Cross-examination?

Mr. Townsend: Yes, your Honor.

(Testimony of L. L. Aubert.)

Cross-Examination

By Mr. Townsend:

Q. Mr. Aubert, could you generally describe the business of the Bankline Oil Company over the years; say, from a few years prior to this 1952 transaction, through the present day, as to just what exactly is your business?

A. Well, it is producing. It was prior to 1952, August of 1952, it was strictly a producing oil company, with manufacturing natural gasoline plant at Signal Hill.

Q. Did you have any other plants similar to the one that you had in Signal Hill?

A. Now, we have got to fix a date here, because, on August 1, 1952, Bankline Oil Company and the Norwalk Company merged, and Bankline became the successor company.

Q. What was that date?

A. August 1, 1952; so, subsequent to August 1, 1952, Bankline had its producing properties, three natural gasoline plants, one at Signal Hill, one at Santa Fe Springs, and one at Maricopa in Kern County, a refinery, and so on.

Q. Then, after the negotiations with Signal in 1952, there were two left?

A. There were two; that's right.

Q. Tell me, Mr. Aubert, what would happen, during the period of your business, to the natural gasoline that would be processed?

(Testimony of L. L. Aubert.)

A. I don't quite get your question now.

Q. In other words, you process this gasoline; that was one phase of your business, is that correct? A. Yes.

Q. Did you do anything else other than that? Were there any other phases of your business?

A. As far as this natural gasoline is concerned?

Q. Yes.

A. We just processed it, and used it in our refining operations.

Q. Well, now, that is what I would like to have you describe. Would you go from the processing through the refining operations, please?

A. Well, it is a bit involved, but——

Q. Make it so a layman would understand it.

A. All right.

We would handle most of that through exchanges. In other words, we do not use Signal Hill gasoline in our refinery operations at Bakersfield, but we deliver natural gasoline to Standard Oil Company and take back natural gasoline from Standard Oil Company in the Bakersfield area.

Q. Your refinery was located in Bakersfield?

A. That's right.

Q. Did you have any other refineries besides the Bakersfield one?

A. In 1952, no. We had an old abandoned plant at Maricopa.

Q. You said 1952, no. At any other time did you have more than one refinery?

A. No; only one refinery.

(Testimony of L. L. Aubert.)

Q. Then, you had an exchange agreement with Standard Oil Company, in which Standard would deliver natural gasoline to you in Bakersfield for your refinery? A. Yes.

Q. What would happen then, sir?

A. We would use it in blending operations, to make the finished motor fuel.

Q. Then what would happen to the finished motor fuel?

A. Sell it as finished motor fuel.

Q. Who would you sell it to, generally?

A. Through our own distribution.

Q. Do you have your own gas stations?

A. Our distributors do. We sell through distributors who have their stations, and they are Norwalk gasoline stations.

Q. So that Norwalk gasoline stations would sell the refined products from time to time?

A. That's right.

Q. That generally has been your business all along, going through the processing business, and then the refining business, and then, finally, sales to the general public? A. That's right.

Q. At service plants. Now, how long did you have this exchange agreement, or carry on this exchange procedure with the Standard Oil Company?

A. Oh, it is—it has been going on for quite some time. We are still carrying on exchanges with Standard and other companies.

Q. When you were processing the gas in the

(Testimony of L. L. Aubert.)

Signal Hill oil field, did you have an exchange agreement with Standard at that time?

A. Oh, yes.

Q. An exchange agreement; let me see if I can get the layman's description of that. Would that be that Standard Oil Company needed natural gasoline in Los Angeles, and that Bankline Oil Company needed gasoline in Bakersfield; now, you produced natural gasoline in Los Angeles, and Standard produced natural gasoline up around the Bakersfield area; and by exchanging like quantities, you merely eliminated the requirement of transporting your gasoline to Bakersfield, and Standard transporting their gasoline to Los Angeles? A. That's right.

Q. After you sold your plant in Signal Hill to Signal Oil and Gas Company, how did you get your natural gasoline in Bakersfield?

A. The same way: We asked Signal if they could deliver the natural gasoline to Standard —I mean, we bought the gasoline from Signal, and then instructed Signal to deliver the natural gasoline to Standard for our account. Standard then delivered the natural gasoline to us in Bakersfield.

Q. Now, sir, is your refinery still in operation?

A. Yes.

Q. How is the natural gasoline delivered up there at the present time?

A. In the same manner.

Q. Standard Oil is delivering?

A. That is not this gasoline, no.

(Testimony of L. L. Aubert.)

Q. No, but Standard Oil is delivering natural gasoline under an exchange agreement?

A. Yes; they are, because they see our inventory backed up. In fact, it backed into Standard, and we are now withdrawing from inventory by taking natural gasoline which Standard now owes us, even though we are not delivering to them at this time.

Q. But your operations haven't changed in any way from 1950 through the present time, as far as the deliveries are concerned and the sale to the public of your finished products?

A. That's right.

Q. You have testified concerning the termination of the contract under which Bankline acquired all the natural gasoline produced by Signal?

A. Yes.

Q. I was interested by the fact that that contract was terminated less than two months prior to the trial, and just nine days after the Government's proposed stipulation of facts in this case was mailed in September to your representative, and that stipulation indicated the Government's theory with respect to that contract.

Now, is it mere coincidence that those dates are so close? A. It is, absolutely.

Q. Under these leases that you had with these oil producers, was there a separate meter for each one of those leases? A. Yes.

Q. Bankline would read those meters and keep track of those meters? A. Yes.

(Testimony of L. L. Aubert.)

Q. After your contract with Signal in 1952, those meters were still in operation, were they not?

A. Right.

Q. But there was only one meter between Bankline and Signal, is that correct?

A. That's correct.

Q. Who handled the separate metering after this contract with Signal Oil and Gas Company——

A. Bankline still handled the separate metering from the various leases, and checked with Signal on the total delivery through the one meter.

Q. Do you know whether there are any extensions on the $85,000 note that Signal gave to you on November 1 of '52? A. Any extensions?

Q. Any extensions.

A. Of what? Time, or what?

Q. Of time.

A. No. I think it was all paid up as stipulated.

Mr. Townsend: I have no further questions.

The Court: Anything further?

Mr. Wilson: Nothing.

The Court: You may step down.

(Witness excused.)

The Court: I think we will take about a ten-minute recess.

(Short recess.)

The Court: Proceed, gentlemen.

Mr. Wilson: If the Court please, my attention was called to an apparent contradiction by Mr.

Green in one place where he testified that the quality of this wet gas was 8 or 9 gallons per thousand cubic feet, and, later on, that it was 8 or 9 thousand gallons per thousand cubic feet. May we stipulate that it is 8 or 9, that figure is correct, rather than 8 thousand or 9 thousand?

Mr. Townsend: So stipulated.

The Court: All right.

Mr. Wilson: Could we introduce by stipulation a copy of the Revenue Agent's report in this case, dated January 13, 1955, and then I would like to withdraw it, and have a copy made for myself. This is the only copy I have.

Mr. Townsend: Your Honor, I have no objection. This is an authentic report, but I do not see the materiality.

Mr. Wilson: The only purpose, and I do not want to be bound by it, is to show that the Government's case, that it was in theory outlined on January 13, 1955, to Petitioner.

The Court: I am sorry, but I did not hear you.

Mr. Wilson: My only purpose is to show that the Government's theory of this case was outlined to us not a month ago, but on January 13, 1955, when they issued their Revenue Agent's report.

The Court: Do you have any objection for that purpose?

Mr. Townsend: No, your Honor, I have no objection.

The Court: It may be received.

The Clerk: That is Exhibit 14.

(Petitioner's Exhibit No. 14 was marked for identification and was received in evidence.)

Mr. Wilson: Mr. Wegfors, please. [46]

R. O. WEGFORS

was called as a witness by and on behalf of the Petitioner, and, having been first duly sworn, was examined and testified as follows:

The Court: Do you think we will be able to conclude this case this morning?

Mr. Wilson: I would just about think so, unless there is considerable cross-examination or Government evidence.

Mr. Townsend: I would estimate so.

The Clerk: Be seated and state your name and address for the record.

The Witness: R. O. Wegfors, W-e-g-f-o-r-s.

Direct Examination

By Mr. Wilson:

Q. What is your occupation, Mr. Wegfors?

A. I am the treasurer of Signal Oil and Gas Company.

The Clerk: Your address, sir?

The Witness: 811 West 7th Street, Los Angeles.

Q. (By Mr. Wilson): Did you have that position in the fall of 1952? A. I did.

Q. What is your technical training?

A. I am a public accountant. I started with

(Testimony of R. O. Wegfors.)

Haskins & Sells in 1928, was in their employ for eight years, when I became an employee of Signal Oil and Gas Company. I have been treasurer since 1945.

Q. As treasurer of Signal Oil and Gas Company, are you generally familiar with its records?

A. Yes; I am.

Q. I show you this stipulation, 8-B, called "Wet Gas Royalty Statement," and ask you to explain that statement to the Court, if you will?

A. May I say, first, that the gas statement is one that is usually used in the ordinary case where we have a contract with an oil producer. It is adapted for that purpose. We used it instead of—in the Bankline case, rather than to print up a special form.

This indicates that the royalty portion for this particular month at 100 per cent was $197,076, and that the weighted average price per gallon was .07-plus, and the royalty value was $13,842. This pertains to the gasoline.

Q. In your opinion, does that statement correctly reflect the transactions that occurred under these contracts that are in the stipulation?

Mr. Townsend: Respondent objects on the grounds that it calls for a conclusion from this witness on that issue, to be decided by the Court.

The Court: Will you read the question again?

(Record read.)

(Testimony of R. O. Wegfors.)

Mr. Townsend: May I ask something, your Honor? I think this witness, as an accountant, undoubtedly an expert accountant, could testify whether these records indicate that a sale took place, or a sale did not take place, but I do not think he should be able to testify as to whether these records are correct or not.

The Court: The difficulty with the question asked is that it not only asks his opinion as an accountant, but asks him to construe the contracts.

I will sustain the objection on that basis.

Q. (By Mr. Wilson): Had you noticed this wet gas royalty statement here used with the Hancock deal prior to recently?

A. Would you ask that again, please?

Q. When did you first notice the formal statement that was made to Bankline Oil Company in connection with these contracts that are in evidence?

A. At the time that we became involved in this case. That would be in 1955.

Q. Will you tell the Court where this average price per gallon of .07236975 comes from?

A. Yes; that is the result of taking the average price of the gasoline at that time, and deducting from it the amount called for by the contract, to arrive at the amount that was due Bankline Oil Company.

Q. Can you tell from Exhibits 8-A or -B what the price of natural gasoline was in December of 1954? A. 8-A or -B?

(Testimony of R. O. Wegfors.)

Q. Yes. A is the first sheet. It is the journal voucher.

A. Yes. According to this record, the price was, of the natural gasoline, was 10 cents, 28 and propane, .0441996 cents.

Q. Do you think that this wet gas royalty statement, Exhibit 8-B, depicts the transaction in the most accurate form?

Mr. Townsend: Object, your Honor. It is another way of asking the same question.

The Court: No; apparently what is asked for is whether or not the exhibit depicts what occurred, what actually occurred, in an accurate form, or most accurate form, from a bookkeeping standpoint.

I will let him answer that question.

The Witness: Would you state the question again?

(Question read.)

A. I would say that it depicts it in an accurate form. The statement is not complete in itself. The computation of the weight and average price per gallon was made on a separate sheet and furnished to Bankline. Other than that, I would say that it is accurate and adequate.

Mr. Wilson: I have no more questions to ask.

The Court: Cross-examine.

(Testimony of R. O. Wegfors.)

Cross-Examination

By Mr. Townsend:

Q. Mr. Wegfors, referring again to the weighted average price per gallon on Exhibit 8-B, .070236975, and directing your attention to Exhibit 8-A, that weighted average price per gallon is the result of deducting what is called processing charge, .032562025, from the present price of .1028, is it not?

A. That is correct.

Q. Mr. Wegfors, the $85,000 payment represented by a note, was that note paid timely, sir?

A. It was paid timely by Signal, yes.

Q. How was that $85,000 payment handled on the books of Signal Oil and Gas Company?

A. It was handled as a charge to the capital asset account, titled—I don't know the exact title, but it would be the property account, natural gasoline contracts.

Q. That payment was amortized over a period of time, Mr. Wegfors? A. That's correct.

Q. Could you tell me generally the rate of amortization?

A. Well, it was amortized on a basis of production. We estimated the number of thousands of cubic feet of wet gas in the properties involved, and that was divided into the $85,000 to arrive at a unit price, and that unit price was multiplied by the number of thousand cubic feet produced

(Testimony of R. O. Wegfors.)

each year, and the resultant figure was the amortization.

Q. Could you tell me approximately how much of that figure has been written off as of today?

A. I would say all but about $20,000 or $25,000.

Q. How did you arrive at the market price of propane?

A. That was the average price that Signal received for the propane when it was sold to its customers.

Q. That would not be set as the natural gasoline by standard prices?

A. Not ordinarily, no.

Mr. Townsend: No further questions.

Redirect Examination

By Mr. Wilson:

Q. Mr. Wegfors, I believe that Mr. Green was not sure whether Signal's retention, under Exhibit No. 3, for propane remained at 1¼ cents, or varied with the price of natural gasoline. Could you cover that?

A. Yes. It varied; well, I might put it this way: There was an escalation feature to the contract. In other words—I am not thoroughly familiar with it; I think Mr. Gifford could give you more information on that—there was an escalation, and it did go up in accordance with the rise in price of probably natural gasoline.

Mr. Wilson: That is all.

The Court: You may step down.

(Testimony of R. O. Wegfors.)

Mr. Townsend: I have one question.

The Court: Just a minute.

Recross-Examination

By Mr. Townsend:

Q. There are two pages connected to Exhibit 8-A, are there? In other words, Exhibit 8-A comprises three pages. Could you tell me what the second and third page of that Exhibit 8-A is, please, if you know?

A. Well, I don't know of my own knowledge. It evidently was prepared by the Bankline Oil Company, and we had nothing to do with its preparation.

Mr. Townsend: Thank you. No further questions.

(Witness excused.)

Mr. Wilson: Mr. Harrell, please.

VERNE HARRELL

was called as a witness by and on behalf of the Petitioner, and, having been first duly sworn, was examined and testified as follows:

The Clerk: Please be seated.

Direct Examination

By Mr. Wilson:

Q. Please state your name and occupation, and address.

A. My name is Verne Harrell, and I am a vice-

(Testimony of Verne Harrell.)

president, and treasurer of Bankline Oil Company. My address is 437 South Hill Street, Los Angeles, for business address; my home address is 541 West Stocker, Glendale.

Q. What was your occupation in the fall of 1952?

A. In the fall of 1952, I was not treasurer of Bankline, but I was vice-president, and I was in charge of the accounts and records of the company.

Q. I will show you Exhibit 8-A, called "Journal Voucher, Bankline Oil Company, December, 1954," and ask if you determined the manner in which that journal voucher was to be made?

A. I did.

Q. Were you advised in doing that; were you advised by any CPA or counsel?

A. I was not.

Q. Is that journal voucher similar in general form to the one that Bankline uses, has used in the months since 1952 to November, 1952?

A. Yes, it is.

Q. Prior to determining upon the form of that journal voucher, had you examined the contracts which now appear in this case as Exhibits 1 and 3?

A. I have not examined those.

Q. What did you use as the basis for determining the form of that voucher?

A. Mr. L. Aubert, president of Bankline, informed me that Bankline had sold its Elwood properties, its Signal Hill plant, and its gas processing contracts for the Signal Hill field, to Signal Oil

(Testimony of Verne Harrell.)

and Gas Company; that, effective on November 1, 1952, Bankline would discontinue the operation of their Signal Hill gasoline plant, and that the wet gas formerly treated in our Signal Hill gas plant would be treated by Signal Oil and Gas Company, but that the obligation to pay the producer's royalty share of gasoline and propane would continue to be with Bankline.

Q. On that journal voucher you have "processing charges from others." What does that mean?

A. That was the difference between the gross amount of natural gasoline and propane, dry sales, dry gas sales, and the amount that we were to receive from Signal, had we not had the obligation to pay the producers, we probably would not have set this entry up in this manner at all, but we set it up in this manner in order to account for the gross proceeds or gross value of the gasoline, propane, and dry gas, in order to compute the royalty share due the producers.

Mr. Wilson: No more questions.

Cross-Examination

By Mr. Townsend:

Q. Mr. Harrell, are you a certified public accountant? A. Yes; I am.

Q. Were you in 1952? A. Yes, sir.

Q. Directing your attention to the second and third pages there of Exhibit 8-A, would you describe generally what those are, please?

(Testimony of Verne Harrell.)

A. Well, these are, appear to be figures, appears to be a copy of a royalty computation statement.

Q. Who made those computations, Mr. Harrell?

A. I don't recognize his handwriting. This is a photostat. I don't recognize the handwriting on it.

Q. They are records of Bankline Oil Company?

A. They would appear to be taken from the records of Bankline Oil Company.

Q. Bankline Oil Company made the computations of royalties? A. Yes; they did.

Q. Those are the royalties to be paid the oil producers under the contracts which are called here in Exhibit 2, that is, with the General Petroleum Corporation, the Jet Oil Company, et cetera?

A. Yes.

Q. They are based on a meter reading with the individual leases? A. That's correct.

Q. The $85,000 payment received by Bankline was reported as capital gain, was it not?

A. Yes, sir; it was.

Q. Would you please indicate on Exhibit 6 where that amount is reported?

A. Well, the total amount of $135,000 only is shown here. It isn't broken down. This is a tax schedule attached to a tax return, and there isn't any breakdown of the item as to the $85,000 in the tax return.

Q. That is contained on a page, a schedule called "Other Income Per Return," Line 14, Page 1 of return, is that correct, sir?

(Testimony of Verne Harrell.)

A. It is included on the page that carries that heading.

Q. I was just identifying it for the record, Mr. Harrell.

Now, the payments received by Bankline in addition to this $85,000 payment, and these are the continuing payments that are referred to that started in 1952 and are still going on, they were reported as ordinary income in 1952, and thereafter by the Bankline Oil Company?

A. That's correct.

Q. Would you please indicate on the return, Exhibit 6, where those amounts are contained?

A. They are contained on Schedule A, attached to the return.

Q. Are they identified as specifically, Mr. Harrell?

A. They are in an item here that is labeled, "Income From Absorption Plants," but there is no breakdown as to plants in here that I see.

Mr. Townsend: No further questions.

Mr. Wilson: No further questions.

The Court: You may step down.

(Witness excused.)

Mr. Wilson: Mr. McCormick, please.

This is our last witness, if your Honor please.

JOHN C. McCORMICK

was called as a witness by and on behalf of the Petitioner, and, having been first duly sworn, was examined and testified as follows:

The Clerk: Would you be seated, please?

Direct Examination

By Mr. Wilson:

Q. Please state your name and occupation and address.

A. John C. McCormick, 523 West Sixth Street, Los Angeles, California. I am a certified public accountant.

Q. Are you associated with an accounting firm?

A. I am a partner with Haskins & Sells.

Q. What is your experience in accounting for oil companies?

A. Well, I handle a great many of the clients of our office who are engaged in the oil business.

Q. Has that gone on for some years?

A. Yes; it has.

Q. Have you examined the stipulation that has been filed in this case? A. I have.

Q. Including contracts, Exhibits 1 and 3, and 8 and 9 and 10? I would like to call your attention particularly to Exhibit 8-A, which is a journal voucher of Bankline Oil Company for the month of December, 1954. Mr. McCormick, assuming that the exhibits in this stipulation, other than Exhibits 8-A and -B, depict the substance of the agreement between Bankline Oil Company and Signal Oil and

(Testimony of John C. McCormick.)

Gas Company of the subject matter covered by Exhibit 3, does Exhibit 8-A, in your opinion, correctly reflect the operations covered by Exhibit 3?

Mr. Townsend: Respondent object, your Honor. I think that is calling on this witness for a legal opinion, as well as an accounting opinion.

Mr. Wilson: If your Honor please, may I respond a little bit to that? We have stipulated the accounting records that Bankline used, which, in itself, constitutes the characterization of these contracts made by a human being, one of the officers of the company. I think we should be permitted to show that that is erroneous.

The Court: No. You could show from this witness, first, what he understands the contracts indicate. Then you can ask him the question you have just asked.

Mr. Wilson: Thank you.

Q. (By Mr. Wilson): Mr. McCormick, what is your understanding of the transaction recorded by this Exhibit 8-A?

A. Would you repeat that?

Q. What does Exhibit 8-A say to you; what kind of a transaction does it describe?

A. Well, Exhibit 8-A would appear to me that Bankline has sold natural gasoline and propane and dry gas to Signal.

Q. Does it indicate that the production of that gasoline was Bankline's? A. Yes, it would.

Q. Does it indicate that Signal was doing the actual processing work for Bankline for a charge?

(Testimony of John C. McCormick.)

A. It would.

Q. Now I would like to again ask you this question:

Assuming that the exhibits other than Exhibits 8-A and -B—namely, 1 and 3 and 9 and 10—depict the substance of the agreements between Bankline and Signal under subject matter covered by Exhibit 3; do you think that this Exhibit 8-A correctly reflects those operations?

Mr. Townsend: Your Honor, Respondent objects. He is asking him to interpret the legal effect of the contracts, Exhibits 1 and 3, and those other contracts.

The Court: I think counsel misunderstood me, possibly, my former ruling. My suggestion was that if the witness preliminarily would state what his understanding of the agreement was, as depicted by the contract, then he could be asked this question.

Q. (By Mr. Wilson): Now, Mr. McCormick, do you understand from Exhibit 3, particularly, and 9 and 10, that—how do you interpret those contracts?

A. Well, Exhibit 3 states that Signal Oil and Gas offers to pay for the above-described properties the sum of $85,000, plus further sums of money calculated in the following manner; and then the next paragraph states how those sums shall be calculated.

Now, looking at the contract, it is rather clear and simple a contract, and I would say that a sale had been made of the gasoline contracts to Signal

(Testimony of John C. McCormick.)

Oil and Gas, and that Bankline was to receive $85,000, plus certain other sums as specified in the contract.

Q. Then, with that understanding of that contract, would you say that this journal voucher, 8-A, which appears to say that Bankline is continuing to produce the gas under the casing-head gas contracts, is correct?

A. No; I would say it is not correct.

Q. Have you drawn a journal entry or entries which, in your opinion, would correctly reflect the contract, Exhibits 3 and 9 and 10?

A. Yes; I have.

Q. Do you have an extra copy that I can give counsel?

Would you describe what you think is the correct entry for this transaction?

A. My first entry would be to record on Bankline's books the amounts receivable from Signal Oil and Gas under the contract.

Mr. Townsend: Pardon me. Your Honor, Respondent objects to this testimony. I assume it is a proposed exhibit here, and it has no probative value. This witness is not testifying as to any facts. He is testifying as to what he would have done if the circumstances were, in his opinion, different from the accountant who made up these entries.

The Court: Would you care to be heard on that objection?

Mr. Wilson: I do not think it is too important. He said he thought the entries were erroneous, and

(Testimony of John C. McCormick.)

I do not think we can too much determine what the correct entry would be.

The Court: I will sustain the objection.

Mr. Wilson: I think that is all.

The Court: Cross-examine.

Cross-Examination

By Mr. Townsend:

Q. Mr. McCormick, when did you first see this contract, Exhibit 3?

A. It is very recently that I have seen Exhibit 3.

Q. How recent, sir?

A. Well, I would say about a week or ten days ago.

Q. Where did you acquire your understanding of the effect of Exhibit 3?

A. Well, I read the contract over, and that was looking at the contract itself, why, that would be my understanding of it. It is not different in understanding than I would have if I came in and made an audit of the company's books, and came across such a contract as this, and the entries recording it in the accounts.

Q. Have you ever before seen a contract just like this one?

A. No; not exactly just like this one.

Q. Or anything very close to this one?

A. Well, I don't know just what you mean by "very close." I have seen short contracts, of this short, simple contract.

(Testimony of John C. McCormick.)

Q. Have you ever seen a contract in the oil and gas field where prices were set up that way, and amounts were going back and forth, as they have in this case?

The Court: Mr. Townsend, you understand that the witness' preliminary answer on direct can have no probative value whatsoever relative to the construal of the contract?

Mr. Townsend: Yes, your Honor; I am probably belaboring the point.

Mr. Wilson: If the Court please, may we mark these journal entries for identification?

The Court: You mean the pages you were about to offer?

Mr. Wilson: Yes.

The Court: Yes; they may be marked.

The Clerk: Exhibit 15, for identification.

(Petitioner's Exhibit No. 15 was marked for identification.)

Mr. Wilson: Petitioner rests, your Honor.

The Court: I understand you offer Exhibit 15 in evidence?

Mr. Wilson: Yes, your Honor.

The Court: I will sustain the objection previously made.

Do you have any other testimony to offer?

Mr. Wilson: No.

The Court: Do you have any testimony to offer?

Mr. Townsend: No, your Honor.

(Witness excused.)

The Court: I will set 60 and 30 days for simultaneous briefs in this case.

Mr. Clerk, you will state the dates.

The Clerk: The dates are: For original, on or before January 24; and reply briefs, on or before February 24, 1958.

The Court: The Court will recess at this time until 1:00 o'clock.

(Whereupon, the hearing in the above-entitled petition was closed.)

Filed December 13, 1957, T.C.U.S.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 12, inclusive, constitute and are all of the original papers on file in my office as called for by the "Designation of Portions of Record Desired on the Appeal," and the "Designation of Additional Portion of Record," including Exhibits 1 through 10, attached to the stipulation of facts, and petitioner's Exhibits 11 through 14, admitted in evidence, in the case before the Tax Court of the United States docketed at the above number and in which the petitioner in the Tax Court has filed a petition for review as above numbered and entitled, together with a true copy of the

docket entries in said Tax Court case, as the same appear in the official docket in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 16th day of September, 1958.

[Seal] /s/ HOWARD P. LOCKE,
Clerk, Tax Court of the
United States.

[Endorsed]: No. 16201. United States Court of Appeals for the Ninth Circuit. Bankline Oil Company, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: September 26, 1958.

Docketed: September 30, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Docket No. 16201

BANKLINE OIL COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

STATEMENT OF POINTS ON WHICH PETITIONER INTENDS TO RELY

To: The Honorable Clerk of the United States Court of Appeals for the Ninth Circuit:

Petitioner adopts as its points on appeal the assignments of error or statement of points upon which it intends to rely, which were included in the petition for review within the transcript of record.

Dated: September 12, 1958.

MELVIN D. WILSON,
MELVIN H. WILSON,

By /s/ MELVIN D. WILSON,
Attorneys for Petitioner.

Receipt of copy acknowledged.

[Endorsed]: Filed October 7, 1958.

No. 16,201

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BANKLINE OIL COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF ON BEHALF OF PETITIONER BANKLINE OIL COMPANY.

MELVIN D. WILSON,
MELVIN H. WILSON,
621 South Hope Street,
Los Angeles 17, California,
Attorneys for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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TABLE OF AUTHORITIES CITED

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Opinion Below.

The opinion of the Tax Court of the United States is reported in 30 Tax Court, Number 44. [Tr. p. 20.]

Jurisdiction.

This case comes before the Court under the provisions of Section 7482 of the Internal Revenue Code on the Petition for Review of a Decision and Order of the Tax Court of the United States (which took jurisdiction under the provisions of Sections 7442 and 6213(a) of the Internal Revenue Code) determining a deficiency of $14,342.52 in the 1952 Federal corporate income tax of petitioner.

The Commissioner of Internal Revenue had proposed a deficiency of $14,342.52 for 1952 by denying petitioner a capital gain treatment on $85,000 it received from the sale of eight casinghead gas contracts to Signal Oil and Gas Company. [Tr. 11-16.]

The Tax Court found that petitioner received such amount for giving Signal Oil and Gas Company a processing job for casinghead gas and that such amount was ordinary income when received by petitioner. [Tr. 43-44.]

Petitioner also claimed before the Tax Court that the further amount of $11,351.41 which it received in 1952 from Signal in the same transaction should also be treated as long-term capital gain. [Tr. 4-10.] The Tax Court also found that amount was ordinary income and not long-term capital gain. [Tr. 44.] On this appeal, petitioner adheres to this point, but in the alternative it takes the position that it sold approximately a 30% interest in the contracts for $85,000 and reserved the balance, with Signal agreeing, as part of the consideration for the 30% interest, to process petitioner's reserved share.

Question Involved.

Are the amounts petitioner received from Signal entitled to capital gain treatment as proceeds from the sale of casinghead gas contracts, or are they ordinary income received for giving Signal a gas processing job for more than normal compensation?

Statement of the Case.

The petitioner is a California corporation, organized in 1912 and has its principal office in Los Angeles, California. It filed its income tax return for 1952 with the district director in that city. During the years involved herein the petitioner kept its books and filed its income tax returns on an accrual basis. [Tr. 55-56.]

The petitioner's business consists of the processing of casinghead gas, hereinafter sometimes referred to as wet gas, derived from the production of petroleum oils, into its separate ingredients, including natural gasoline, dry gas and propane gas, and the operation of a petroleum refinery where natural gasoline is blended with other gasoline and after being refined is purveyed to the public through retail outlets. Its refinery is located at Bakersfield, California. Its processing plants were during 1952 and prior thereto located in Santa Fe Springs, Maricopa and Signal Hill, California. An important determining factor with respect to profitable operation of a casinghead gas processing plant is the availability of an adequate supply of gas so that the plant may be operated at as nearly as possible its full capacity. [Tr. 56, 57, 231, 242.]

More than 6 months prior to November 1, 1952, petitioner had entered into eight separate contracts with oil producers, hereinafter referred to as producers, for the acquisition by it of casinghead gas produced from drilling operations in the Signal Hill Oil Field. [Tr. 57, par. 7.] The contracts generally each provide that petitioner was to install and maintain pipelines from producers' wells or gas traps to its Signal Hill processing plant; that it equip the lines with meters so that accurate account might be kept of all gas emanating from the wells of individual producers; that the producer would deliver the wet gas produced at his wells to the pipeline; that petitioner was to process the gas and pay each producer a percentage of the total gross proceeds derived from petitioner's sale or use of the natural gasoline and propane gas extracted by such processing. The producer had an option to receive payment in kind if he

so desired. Upon completion of the processing, petitioner had the right to sell to others all of the product not required to be returned to the producer and thereupon to pay the producer not being paid in kind, a stipulated percentage of the gross sale price received. Petitioner had the right to and did use the natural gasoline so derived in its refinery and was required to pay the producer an equivalent royalty therefor based upon the market price thereof. [Tr. 70-181, Exs. 2-A to H.]

The natural gasoline used by petitioner in its refinery under the contracts referred to was not the identical gasoline resulting from its processing operation. Such gasoline was obtained at its Bakersfield refinery from Standard Oil Company of California through an exchange agreement with that concern. By virtue of the exchange agreement petitioner escaped the cost of transporting its natural gasoline from its processing plant at Signal Hill to the refinery.

The Signal Oil and Gas Company, hereinafter referred to as Signal, owned and operated a processing plant for casinghead gas located in the Signal Hill Oil Field. [Tr. 234.] During the fall of 1952 petitioner determined that the operation of its processing plant in Signal Hill was unprofitable or in danger of becoming so because of an inadequate supply of gas and for that reason sought a profitable method of divesting itself of its processing plants and equipment and casinghead gasoline contracts. [Tr. 231, 232.] To that end, in the fall of 1952, it began negotiations with Signal for sale to the latter of its processing plant and casinghead gas contracts in Signal Hill. [Tr. 231, 233.] On November 1, 1952, the negotiations culminated in the sale by petitioner to Signal for $50,000 of its Signal Hill

processing plant, pipelines, pipes, meters, and fittings in the Signal Hill Oil Field (except the pipelines, pipes, meters, and fittings located on the properties from which wet gas was currently being delivered under the above-mentioned eight contracts with oil producers), together with other properties owned by petitioner consisting of oil leases, interest in lands and gasoline storage for pier facilities located in Santa Barbara County, California. [Tr. 233-236, Ex. 1, Tr. 63-69.]

On the same date, a separate agreement was entered into by petitioner and Signal. [Tr. 182-187, Ex. 3.] This agreement was effected by petitioner's acceptance on November 1, 1952, of the following offer of Signal contained in a letter addressed to petitioner and dated October 29, 1952:

> "Subject to the conditions and for the considerations hereafter set forth, Signal Oil and Gas Company hereby offers to purchase from you the following properties, to-wit:
>
> "All leases, gas contracts or other purchase agreements held by Bankline for the purchase or processing of wet gas from properties located in the Signal Hill Oil Field. A schedule of said instruments is hereunto attached and by this reference made a part hereof and marked Exhibit 'A'.
>
> "Signal Oil and Gas Company offers to pay for the above-described properties the sum of $85,000, plus further sums of money calculated in the following manner:
>
> "Signal shall process said wet gas, or cause said wet gas to be processed, at its plant in the Signal Hill Oil Field or at such other plant or plants as Signal shall hereafter elect, whether or not said plants shall be owned and/or operated by Signal. All dry

gas resulting from said operations not required to be returned to the properties from which produced shall be sold by Signal and the net sales price paid to Bankline monthly. All natural gasoline and LPG Propane extracted by Signal from said wet gas shall likewise be sold by Signal at the average price it receives for like products sold by Signal, and Signal shall pay Bankline monthly a sum of money equal to the sales price of said natural gasoline and LPG Propane, less the following sums, to wit:

> The sum of 2½¢ per gallon on all natural gasoline and the sum of 1¼¢ per gallon on all LPG Propane.

"Said deductions are based upon the present price of 8.33¢ per gallon posted by Standard Oil Company of California for 21# R.V.P. natural gasoline in the Signal Hill Oil Field and shall be increased or decreased at the times and in direct proportion to any increase or decrease above or below said price of 8.33¢ per gallon posted by Standard Oil Company of California for 21# R.V.P. natural gasoline in the Signal Hill Oil Field.

"Connections shall be established between the wet gas lines presently owned and operated by Bankline and those presently owned and operated by Signal at two locations, to wit: in the proximity of Temple and Hill Streets and in the proximity of Willow and Walnut Streets, Signal Hill, and transmission of said gas shall be made at said points or at other points if in Signal's judgment other connections shall be required. Signal shall also connect its dry gas lines to the dry lines presently owned and operated by Bankline in the proximity of Cherry and Willow Streets for delivery of gas to the properties from which it is produced, when such re-delivery shall

be required. Signal shall meter the wet gas in master meters installed for said purpose and shall make all applicable tests at said points, accounting to Bankline for the entire amount of wet gas received pursuant to this agreement without allocation as to the individual properties from which said gas is produced.

"Signal in its operations hereunder shall use the same metering, testing, and accounting procedure currently used by Signal in connection with other wet gas being purchased by Signal in said Signal Hill field and drips secured from the pipeline system of Bankline will be accounted for on the same basis as other drips collected by Signal; provided, however, that such procedures of metering, testing and accounting shall conform with the provisions of the agreements described in Exhibit 'A' as modified from time to time by usages and customs in the industry.

"This agreement shall remain in full force and effect for the period of ten years from November 1, 1952, and thereafter so long as Signal shall elect. In the event that at any time after ten years from November 1, 1952, Signal shall desire not to receive and/or process the wet gas produced from the properties described in Exhibit 'A' it shall give written notice to that effect to Bankline. Within thirty days after said notice Bankline by written notice to Signal may elect to purchase the leases, gas contracts and other purchase agreements herein purchased from Bankline for the sum of $10.00 and have such of said leases and other agreements then remaining in effect reassigned to it, and upon notice to that effect Signal shall reassign all of said leases and agreements. In the event Bankline shall not elect to receive such reassignments, then Signal may without

> further obligation to Bankline sell or assign said agreements to third parties or may quitclaim, surrender or otherwise terminate any or all of them."

Under this contract Signal was to get 30% of the casinghead gasoline and propane at all times (2.50 ÷ 8.33 is 30%). [Tr. 183.]

The contracts listed in Exhibit A mentioned in the foregoing agreement were the eight contracts with oil producers heretofore mentioned. [Exs. 2-A to 2-H, Tr. 70-81.] Pursuant to the foregoing agreement, petitioner on November 1, 1952, executed an "Assignment" which recited that petitioner did thereby assign to Signal "all its right, title and interest in, to and under" the eight contracts. [Ex. 10, Tr. 215.]

The payment of the $85,000 amount called for by the agreement was by Signal's noninterest-bearing note, dated December 1, 1952, in that amount, providing for installment payments of $4,000 monthly over a 20-month period and a final payment of $5,000. [Ex. 4, Tr. 187.] Subsequently, the note was paid in accordance with its provisions. [Tr. 264.]

On November 1, 1952, petitioner and Signal orally entered into another agreement which was reduced to writing on December 1, 1952, and was set out as follows in a letter from Signal to petitioner dated December 1, 1952:

> "Reference is made to our letter to you dated October 29, 1952, wherein Signal Oil and Gas Company offered to purchase from you certain leases, gas contracts and other purchase agreements held by Bankline for the purchase or processing of wet gas from properties located in the Signal Hill Oil

Field, which offer was accepted by you under date of the ..... day of November, 1952.

"Signal Oil and Gas Company hereby agrees to sell and deliver to you natural gasoline in monthly amounts equivalent to the amount of natural gasoline extracted by Signal from the wet gas processed by it under the provisions of the above-mentioned letter agreement of October 29, 1952. The term of this agreement shall be ten years from November 1, 1952, and so long thereafter as Signal shall be receiving wet gas produced from the above-mentioned wells.

"The sales price of all natural gasoline delivered pursuant to this agreement shall be the average price received by Signal during the month in which deliveries are made for natural gasoline of like quanity sold by Signal in the Signal Hill Oil Field.

"Nothing herein contained shall be construed as requiring us to produce a product of any particular vapor pressure, but delivery shall be made in such product as Signal shall from time to time be producing at the plant in which the above-mentioned wet gas is processed." [Ex. 7, Tr. 203.]

During the negotiations Signal, for accounting and tax purposes, desired that the $135,000 purchase price for petitioner's properties be broken down and allocated in the contracts herein referred to—$85,000 for the casinghead gas contracts; $25,000 for the processing plant and equipment, and $25,000 for the other assets of petitioner. [Tr. 239, 240.] Petitioner was at first indifferent with respect to an allocation, but later became concerned lest the allocation for the processing contracts be determined to constitute ordinary income. It ex-

pressed its concern to Signal and, as a result, that company, by letter also dated December 1, 1952, agreed

> "to indemnify and hold Bankline Oil Company harmless from the payment of any greater United States corporate income tax pursuant to Sections 13, 15 and 430 of the Internal Revenue Code on the receipt of said sum of $85,000.00 than the said income tax calculated on said sales price pursuant to Section 117 of the Code." [Ex. 5, Tr. 188, 244.]

There was no discussion between the representatives of petitioner and Signal that petitioner employ Signal to process the wet gas from the eight casinghead gas contracts for petitioner for compensation. [Tr. 240, 247.]

On its acquisition of petitioner's Signal Hill processing plant, Signal dismantled it but connected its main pipeline to petitioner's former line and thus conducted the wet gas formerly processed by petitioner to its Signal Hill processing plant. A meter was installed by Signal upon its main pipeline and it thereafter accounted to petitioner for the total gas received by that means. [Tr. 58, par. 12; 234, 235.]

Subsequent to the above transaction, petitioner continued to own and maintain the pipelines to the producers and the meters used in connection therewith and made regular meter readings of the gas received from each producer. The petitioner continued to be liable to the producers for royalties on the gas obtained from them and continued to maintain its own royalty records and to compute and to pay royalties due the individual producers. [Tr. 58, par. 11; 234, 235.]

Generally, petitioner's operations with Signal were carried on as follows:

All the natural gasoline produced by Signal under the contracts with the oil producers was sold to petitioner [Tr. 203, Ex. 7] and delivered to Standard Oil Company of California under an exchange agreement for the account of petitioner. [Tr. 254, 255.] At petitioner's direction a portion of this gasoline was delivered by Standard Oil Company to one of the producers to satisfy petitioner's obligation to deliver natural gas as a royalty in kind under the contract between petitioner and that producer. A quantity equal to the balance of the natural gasoline produced was delivered by Standard Oil Company to petitioner at the Bakersfield refinery pursuant to an exchange agreement between Standard Oil Company and petitioner. [Tr. 254-257.]

Signal billed petitioner for the entire amount of natural gasoline extracted by Signal from the wet gas processed under the contracts with the oil producers, and petitioner paid this amount to Signal. [Tr. 60, 209, Ex. 8-B.] Signal then paid petitioner the amount required by Exhibit 3. [Tr. 210, Ex. 8-C.]

The liquid propane extracted by Signal from the wet gas processed under the contracts with the oil producers was sold to third parties by Signal. The total sales price was received by Signal, and the amount required by Exhibit 3 was paid by Signal to petitioner. [Tr. 60, item b.]

The dry gas was handled in the following manner:

A portion of the dry gas was returned to the leases as required by the contracts with the oil producers. [Tr. 60, item d.] Where the dry gas returned to the

leases was in excess of the amount required under the contracts, petitioner billed the producers directly and received the proceeds. [Tr. 60, item e.]

A portion of the dry gas was delivered to one of the producers by Signal for the account of petitioner to satisfy petitioner's obligation to deliver dry gas as a royalty in kind under the contract between petitioner and that producer. [Tr. 60.]

The remainder of the dry gas was sold to third parties by Signal and the entire proceeds were remitted to petitioner. [Tr. 60, 183, Ex. 3.]

Signal, although using less than its total capacity as of the fall of 1952, was operating its Signal Hill processing plant with an adequate supply of casinghead gas. [Tr. 239.] Its processing of additional gas which it might obtain through petitioner's contracts with producers would be at only a slight increase in its cost of operation. [Tr. 239.] Such gas was unusually rich in that it produced between 8 and 9 gallons of natural gasoline per 1,000 cubic feet of gas. [Tr. 239.] The royalties to producers under petitoner's eight contracts averaged about 42 per cent of the value of natural gasoline and propane gas produced by the processing of wet gas emanating from their wells. [Exs. 2-A to 2-H, Tr. 70-182.] In 1952 the going rate of such royalties to all producers in the Signal Hill area was about 55 per cent. [Tr. 236.] Signal believed the production of casinghead gas from wells in this field would remain relatively constant over a number of years. [Tr. 239.]

During 1952 the usual charge in the Signal Hill Oil Field for processing wet gas varied between $0.0075 and $0.0085 per gallon of natural gasoline resulting

therefrom. [Tr. 241.] Ordinarily in 1952 in the Signal Hill area a contract to process wet gas was characterized by an agreement to extract natural gasoline propane and dry gases therefrom for a fixed price per gallon of gasoline thus produced. All products of the extraction process were returned to the owner of the wet gas or other entity having the right to such products. No title to the wet gas passed to the processor. Such contracts were also characterized by provision for their termination on relatively short notice. To pay a processor a bonus for his services was not customary. [Tr. 241.]

On its books Signal treated the November 1, 1952, transacton relating to the eight producers' contracts as constituting the acquisition of a capital asset and has amortized the amount of $85,000 as the cost thereof over their probable life. Signal treated the further amounts paid to petitioner as deductible "royalties." [Tr. 62, 209.]

Petitioner treated the $85,000 as the sale price of the eight contracts. [Tr. 14, 15, 269.] On its books petitioner has treated Signal's subsequent disposition of the products produced as petitioner's sales of those products and the amounts retained by Signal as its charges for processing.

Petitioner kept its books in that manner to satisfy the provisions of the casinghead gas contracts that the sales of all products produced from the wet gas under the eight contracts were to be shown on petitioner's books for the purpose of inspection of the royalty figures by the eight gas producers. [Exs. 8-A to 8-H, Tr. 10-182.] If the petitioner had not undertaken to continue to pay

the producers the royalties it would not have kept its books in that manner. [Tr. 269.]

The oral agreement which was reduced to writing on December 1, 1952, relative to the sale by Signal to the petitioner of natural gasoline equivalent in amount to that obtained through the eight producers' contracts here involved, was cancelled by the parties thereto on October 9, 1957, effective as of October 1, 1957. [Tr. 250.] Thereafter Signal sold the casinghead gasoline to Standard Oil Company at the same price it had been receiving from petitioner. [Tr. 242, 204.]

Petitioner at approximately the same time cancelled other contracts by which it had been purchasing natural gasoline, as its inventory of natural gas exceeded its needs therefor. [Tr. 252.]

The petitioner was not engaged in the business of buying and selling casinghead gas contracts. [Tr. 57.] It had no cost or other basis for the eight producers' contracts involved herein. [Tr. 57.]

The following is a statement computed on an accrual basis showing the results of Signal's and petitioner's operations for the months of November and December, 1952, and the years 1953, 1954 and 1955, with respect to the eight producers' contracts involved herein:

	1952	1953	1954	1955
Total value of natural gasoline produced by Signal	$30,557.27	$243,189.78	$231,449.15	$228,378.35
Total amount of propane gas sold third parties by Signal	666.73	5,529.09	5,401.10	4,814.48
Total amount received by Signal from sale of dry gas not consumed by oil and gas producers nor by Signal	1,817.14	13,997.25	13,869.17	16,229.30
Total amount of dry gas delivered by Signal as royalty in kind for account of petitioner	942.66	7,201.64	7,129.82	8,226.81
Total amount of dry gas returned to leases in excess of amounts required by leases	57.57	275.55	229.26	227.47
Total	34,041.37	270,175.31	258,078.50	257,876.41
Portion of sales price of natural gasoline and propane gas retained by Signal	10,235.87	79,196.89	75,026.84	74,772.56
Amounts remitted by Signal to petitioner	23,805.50	190,978.42	183,051.66	183,103.85
Royalties paid by petitioner (plus fair market value of natural gasoline and dry gas delivered in kind)	12,454.09	96,488.68	92,048.81	92,638.42
Net amount remaining after petitioner's payment of royalties to producers	11,351.41	94,489.74	91,002.85	90,465.43

[Tr. 60, 61]

The arrangement between petitioner and Signal was mutually profitable and advantageous. Petitioner with its inadequate supply of gas for its Signal Hill plant was either operating unprofitably or had about reached that point. Under the contract with Signal, petitioner received approximately $90,000 a year from the casinghead gas contracts, and Signal retained approximately $75,000 a year with very little expense [Tr. 60, 61] other than the amortization of the $85,000 it paid for its approximate 30% interest in the casinghead gas contracts. [Tr. 239, 62, item 20.]

In Schedule D of its income tax return for 1952 the petitioner reported a long term capital gain of $94,440.84 from the sale of capital assets. In an accompanying schedule in explanation of the gain the petitioner showed the sale of four automobiles, two parcels of real estate and some casing as having been made on August 31, 1952, and prior thereto during 1952. In further explanation the petitioner showed as having been sold on November 1, 1952, the following: "Signal Hill Absorption plant, State Lease PRC 421, and Bishop Tank farm." The gross sale price of the foregoing was shown in a single amount as $135,000. Also shown in single amounts were depreciation, $973,441.76; cost $1,013,664.67, and gain, $94,777.09. [Ex. 6, Tr. 189-202.]

After making a field investigation of the petitioner's income tax liability for 1952, the respondent determined that $85,000 of the $94,777.09 reported by petitioner as long term capital gain from the sale of the absorption plant, the state lease gas contracts and the tank farm constituted ordinary income, giving the following explanation in the notice of deficiency for his action:

> "You reported as long term capital gain the sum of $85,000 received during the taxable year from Signal

Oil and Gas Company under the terms of an agreement dated November 1, 1952, providing for the processing by that corporation of wet gas from certain properties located in the Signal Oil Field District which were covered by your previous agreements with the producers." [Tr. 269.]

"It is held that the sum of $85,000.00 received in the taxable year constitutes ordinary taxable income under the provisions of section 22 of the Internal Revenue Code of 1939 instead of long term capital gain as reported on your return." [Tr. 13, 14, 15.]

Under the processing arrangement with Signal respecting the eight producers' contracts there accrued to the petitioner during the months of November and December, 1952, total income in the amount of $11,351.41. [Tr. 61.] In its income tax return for 1952, the petitioner reported that income as ordinary income. Like income accruing to the petitioner in subsequent years has been so reported by it in its returns for those years. [Tr. 270.]

Errors Relied Upon.

1. The Tax Court erred in failing to find that petitioner as an operator of a casinghead gas plant was a manufacturer and not a mere renderer of services for compensation and that it used the eight casinghead gas contracts in its business and that such contracts constituted valuable assets.

2. The Tax Court erred in failing to find that petitioner sold to Signal its eight casinghead gas contracts, or alternatively, approximately a 30% interest in said contracts and reserved the remaining 70% interest.

3. The Tax Court erred in failing to find that Signal was also a manufacturer with respect to its interest in said

contracts and with respect to said interest was manufacturing for itself and not working for petitioner.

4. The Tax Court erred in failing to find that the $85,000 and $11,351.41 received by petitioner from Signal were items of income subject to treatment as long term capital gain.

5. The Tax Court erred in deciding that there was a deficiency in petitioner's 1952 Federal corporate income tax liability of $14,343.52.

6. The Tax Court erred in failing to find that petitioner has overpaid its 1952 taxes by $10,688.30.

Summary of the Argument.

Though petitioner was not an extractor of wet gas from its deposit under the ground for depletion purposes, it was more than a renderer of services for compensation. It was a manufacturer acquiring title to the wet gas, changing its form in its plant by the use of capital, labor and management, and selling its finished products.

Petitioner had owned for more than six months eight casinghead gas contracts which entitled it to the exclusive output of wet gas of certain oil wells. These contracts were used by petitioner in its trade or business and were not held primarily for sale.

Said casinghead gas contracts constituted property and valuable property, although they were more valuable in the hands of casinghead gas processors who had a greater supply than did petitioner.

Petitioner sold to Signal said contracts for $85,000 and further amounts measured by production.

Alternatively, petitioner sold to Signal approximately a 30% interest in said contracts for $85,000 and the obligation of Signal to process petitioner's reserved 70% interest in said contracts. The parties to the contract in their books and tax returns so treated the matter. Petitioner reported the $85,000 received for the 30% interest in the contracts as long term capital gain and treated the rest of the money it received from Signal as ordinary income received in its gas processing business.

Signal reported the $85,000 on its books and income tax returns as the cost of a 30% interest in the contracts and amortized said cost over their probable life. The 70% interest of the proceeds which it paid to petitioner was treated by Signal as deductible royalty.

Sales of part interests in contracts are quite customary in businesses carried on in the oil, real estate and patent field.

The fact that there were some restrictions on Signal's rights to dispose of the casinghead gas contracts does not preclude the transaction from being a sale of an interest in the contracts. Signal could have assigned the contracts to anyone who would take them subject to the same conditions under which it held them. Signal or its assignee could have used the contracts as long as they desired.

Petitioner sold a 100% or alternatively a 30% interest in the casinghead gas contracts and is entitled to long term capital gain on the proceeds, either under Sections 117(c)(2) and 117(a), or 117(j).

ARGUMENT.

I.

Petitioner, as an Operator of a Casinghead Gas Plant Was a Manufacturer and Not a Mere Renderer of Services for Compensation.

It is clear from the opinion of the Tax Court, pages 39 and 40 of the Transcript, that the Tax Court thought that petitioner was merely performing services for the wet gas producers and eventually that Signal merely performed part of those services. The Tax Court apparently arrived at this conclusion from a reading of *Helvering v. Bankline Oil Company,* 303 U. S. 362, which held that Bankline did not have an economic interest in the wet gas in the earth which entitled it to depletion deductions. The Tax Court obviously failed to recognize that for the purpose of determining the right to take depletion deductions a distinction is properly made between producers of wet gas and processors of wet gas. A processor does not have an economic interest in the oil and gas in place, but he might still be classed as a manufacturer.

In a broad sense, everyone renders a service, even General Motors Corporation. However, in a narrower sense, General Motors Corporation is a manufacturer; it is buying raw materials, processing them in its plants using labor management and capital and selling the finished product.

Likewise, Bankline was a manufacturer, using its own plant, buying raw materials and through the use of labor, capital and management changed the nature of the raw materials, producing a finished product which it owned and sold. [Tr. 183.] While it rendered a service to the world, it rendered it as a manufacturer, not as a mere renderer of services for hire.

Bankline, under the eight casinghead gas contracts, obtained title to the wet gas because the wet gas from all of the producers was commingled [commingling authorized, Tr. 74 and 76] and the form of the product was changed [from wet gas to gasoline, Tr. 72] so that it was no longer identifiable, and as the "purchase price" [Tr. 71] for the delivery of the raw materials, Bankline agreed either to return a different product or money. [Tr. 72.] Under these circumstances, there was a sale of the wet gas to Bankline and not a bailment for hire. Accordingly, Bankline was a manufacturer and not merely a performer of services.

In *Alamitos Land Company v. Texas Company,* 11 Cal. App. 2d 614, the Court held that a casinghead gas contract was a contract of sale because the wet gas was delivered to the casinghead gas operator who obtained title and thereby became the owner and not a bailee, for the reason that there was a commingling of the gas from the various producers and the substances of the wet gas was changed so that it completely lost its identity. The court spoke of the gasoline "manufactured" from the wet gas. In the *Alamitos* case, the following language was quoted from the case of *Scott Mining and Smelting Company v. Shultz,* 67 Kan. 605, 73 Pac. 903:

> "If the identical thing delivered is to be returned, it is a bailment, and there is no transfer of title; but if the one to whom it is delivered may return another thing of the same kind, or an equivalent in the form of money, or otherwise, it will ordinarily constitute a sale and effect a change of title."

Courts in other states have held that title to wet gas passes to the casinghead gas processer under casinghead gas contracts. *Saulsbury Oil Company v. Phillips Petroleum Company* (C. A. 10), 142 F. 2d 27, cert. den.,

323 U. S. 727; *Martin v. Amis* (Tex. Com. App.), 288 S. W. 431. It is clear from these authorities that Bankline was not merely performing work or services for the gas producers but it was a manufacturer buying raw materials, changing their form and nature, destroying their identity in its plant through the use of capital, labor and management, receiving title to the casinghead gas and owning and selling the finished products.

By the same token, Signal, as a casinghead gas operator, was also a manufacturer and not merely a renderer of services for hire.

II.

The Casinghead Gas Contracts Were Assets Used by Petitioner in Its Trade or Business, Were Not Held Primarily for Sale and Had Been Held for More Than Six Months and Were of Great Value.

As a manufacturer, Bankline had a plant, labor and capital and it had contracts which entitled it to receive raw materials. These contracts, like patents, or leases and other intangible assets, were assets used by it in its trade or business. Petitioner held these contracts for more than six months and was not in the business of buying or selling casinghead gas contracts. The casinghead gas contracts were definitely property and valuable property. Article 223 of Regulation 45 (not now in effect) recognized that casinghead gas contracts were property. The regulation read:

> "Casinghead gas contracts have been construed to be tangible assets * * *."

In *Boynton Gasoline Company,* 6 B. T. A. 434, and 10 B. T. A. 19, the casinghead gas contracts there involved were held to be depreciable property and includa-

ble in "invested capital" at a value, for excess profits tax purposes, of $100,000.

Contracts of other kinds have been held to be property and capital assets. In *Commissioner v. Goff* (C. A. 3), 212 F. 2d 875, cert. den., 348 U. S. 890, it was a contract entitling the holder to buy all of the hosiery produced by specific machines in a certain plant; in *Commissioner v. McCue Brothers and Drummond, Inc.* (C. A. 2), 210 F. 2d 752, it was a lease of realty; in *Jones v. Corbyn* (C. A. 10), 186 F. 2d 450, it was an insurance agency contract; in *United States v. Jones* (C. A. 10), 194 F. 2d 783, and in *Vermont Transit, Inc. v. Commissioner* (C. A. 2), 218 F. 2d 468, there were bus franchises.

The casinghead gas contracts in the case at bar were valuable property especially when owned by a casinghead gas operator who had an economic amount of wet gas to process. This is clearly evident from the record in this case, especially pages 60 and 61 of the Transcript.

The casinghead gas contracts owned by petitioner were therefore either capital assets held for more than six months or were depreciable property held for more than six months and used by the taxpayer in connection with its trade or business. Under Section 117(a) or 117(j) of the Internal Revenue Code of 1939, the profit on this sale would be long-term capital gain or treated as long-term capital gain. Section 117(c)(2).

III.

Petitioner Sold to Signal an Interest in the Casinghead Gas Contracts.

The resolution of petitioner's Board of Directors authorized it to sell its entire interest in the casinghead gas contracts, and it gave a bill of sale for the entire interest in said contracts and the contract with Signal provided that the contracts were to be sold to Signal. Petitioner accordingly took the position before the Tax Court that such entire interest was sold and if such position is here upheld, it would necessarily follow that petitioner is entitled to capital gains treatment not only as to the $85,000 but also as to the $11,351.41.

It so happens, however, that the parties have treated the transaction on their books and tax returns as a sale of approximately a 30% interest and the reservation by petitioner of the balance of the rights under the casinghead gas contracts.

It is now submitted that even if petitioner is bound by the foregoing developments (and the Tax Court's findings thereon) still petitioner, even though not entitled to the capital gains treatment on the above $11,351.41, would nevertheless be entitled to such treatment on the foregoing $85 000 since, as shown below, there was at least a sale of a 30% interest by petitioner and the $85,-000 gain was entirely attributable to the sale of such 30% interest which constituted a capital asset under the authorities herein discussed.

On the basis of the then price of 8.33¢ per gallon, Signal was entitled to 2½¢ per gallon, which is 30% of the above 8.33¢ and likewise if this last mentioned figure increased or decreased such 2½% increased or decreased

proportionately. [Tr. 183.] It therefore follows that, in substance and effect, Signal's purchase was always equal to a 30% interest and the remaining 70% interest was reserved by petitioner.

Petitioner reported the $85,000 as the sale proceeds of the contracts and as long-term capital gain and treated the additional receipts from Signal, which came out of production, as being ordinary income.

Signal on its books and tax returns capitalized $85,-000 as the cost of an interest in the casinghead gas contracts and amortized this over their probable life. Signal has deducted as royalties the remaining 70% of the proceeds from the sale of the products and has not treated these amounts as being part of the purchase price of the contracts. (*Supra,* p. 13.)

It is to be noted that Exhibit 5, Transcript, page 188, the indemnity agreement on the income tax treatment, related to the $85,000 only, the amount petitioner received for the 30% interest in the contracts.

This treatment or interpretation by the parties is entitled to weight and is consonant with the Tax Court's finding that petitioner continued to maintain gas gathering lines, meter the gas and pay royalties to the gas producers and had expenses in connection with said operations and received ordinary income offsetting such expenses, with the balance constituting net ordinary income.

Petitioner, however, sold to Signal an interest in the casinghead gas contracts and Signal became the owner of such interest and thereafter acted as a manufacturer for its own account as to that part. That part constituted 30% of the natural gasoline and propane to be produced. [Tr. 182-183.]

Signal, as the purchase price of its 30% share, paid $85,000 and, of course, agreed to process its own wet gas and process petitioner's royalty share of the wet gas as well as the royalty share going to the wet gas producers.

In other words, petitioner sold the contracts for $85,-000, but reserved from the sale approximately 70% of the production. [Tr. 182-183.]

An asset may be sold in its entirety or in part. This is well illustrated in the patent field where the law on contract rights is well developed.

For example, in *United States v. Carruthers* (C. A. 9), 219 F. 2d 21, the inventor had a process and sold rights under the patent for use only in the tuna industry. He kept the rights for use in other industries. Nevertheless the transaction was held to be a sale.

In *Vincent A. Marco,* 25 T. C. 544 (dismd. C. A. 9, 1956), the inventor was given capital gain treatment on the sale of an interest in a patent to be used only west of the Mississippi River.

In *Cavanaugh v. Evans* (C. A. 6), 188 F. 2d 234, the inventor was given capital gain treatment on the transfer of an interest in a patent although he retained the use of the invention for himself and one assignee.

In *First National Bank of Princeton v. United States,* 136 Fed. Supp. 818, a patent covered the manufacture of brushes and the inventor sold the right to make, use and sell tooth brushes only and retained the right to use the patent for other kinds of brushes. Nevertheless, he was given capital gain treatment.

In *Merck & Company, Inc. v. Smith,* 155 Fed. Supp. 843 (affd. C. A. 3, 11-24-58), the taxpayer had a patent

on sulfa drugs and it sold the right only on sulfadiazine. Nevertheless, it was given capital gain treatment.

These cases indicate that it is not unusual to sell merely part interest in certain rights and that is what petitioner did. It sold to Signal for the full economic life of the wet gas resources, the right to 30% of the gasoline and propane. The amount received for such rights was, as indicated above, $85,000, plus the liability of Signal to process the balance of the wet gas.

The Tax Court stated, as one of its grounds for holding that the entire effect of the transaction between petitioner and Signal was a contract for services and not a sale, that if Signal did not desire to receive or process the wet gas produced from the properties covered by the producer's contracts, Signal would not be free to dispose of the contracts immediately in any way it saw fit. [Tr. 41.] It must give petitioner notice of its desire not to receive or process any further gas and petitioner upon payment to Signal of the sum of $10 would be entitled to have the contracts reassigned to it. The Court said that Signal's profits or gains from the contracts were limited solely to the amounts received under the arrangement of November 1, 1952, with respect to the natural gasoline and propane gas which was sold after it processed the casinghead gas. [Tr. 41.]

It may be reasonably inferred from the assignment contract that the parties expected that the wet gas would be completely depleted within ten years; hence, Signal had the right to take the wet gas under these eight contracts for their probable productive life. Furthermore, Signal had the option after 10 years to keep the contracts or to sell them back to petitioner.

These restrictions should not preclude this transaction from being a sale.

In the patent field many courts have held that some restriction on the sale of the patent by the assignee did not preclude the transaction from being a sale by the assignor to the assignee.

In *Edward C. Myers,* 6 T. C. 258, the possibility of reverter was considered as a condition subsequent and did not preclude a sale. That case has now been acquiesced in by the Government. Rev. Rul. 58-353, I. R. B. 58-29. To the same effect, see *Pike v. United States,* 101 Fed. Supp. 100. In *Allen v. Werner* (C. A. 5), 190 F. 2d 840, the court found the fact that the agreement was terminable at the vendee's option on notice or at the vendor's option for breach did not preclude a sale. That same case held the fact that the assignee was prohibited from assigning except on the transfer of all of its assets, business and good will did not preclude a sale.

In *Carroll Pressure Roller Corporation,* 28 T. C. 1288, Acquiescence I. R. B. 1958-46, the transaction was held to be a sale of a patent although the licensor retained royalties, retained foreign rights, retained the right to veto an assignment and the right to terminate the contract on breach thereof.

The Tax Court in the case at bar also seemed impressed by the fact that petitioner accounted for everything but the $85,000 as being part of its own operations. In other words, it treated as its sales, Signal's disposition of the products resulting from the processing of the casinghead gas and treated the amounts retained by Signal as Signal's charges for processing gas. [Tr. 41, 42.]

A somewhat comparable situation involving a patent was held not to preclude a sale. In *General Spring Corporation,* 12 T. C. M. 847 (1953 Memo Tax Court Decision), after the so-called sale of the patent, the assignor continued to deduct depreciation on the patent in its tax returns. Its tax returns showed its business to be that of "licensing patents" and its officers spent approximately ten years endeavoring to develop a market for the assignee's products. The court treated the rendering of services as being part of the cost of making the sale. That situation is somewhat similar to the rendering of services continued by petitioner after its sale of an interest in the contracts to Signal.

The Tax Court, as indicated above [Tr. 41], thought that Signal could not assign the rights under its contract with petitioner until after petitioner had refused to buy the contracts back. The broad principle is that assignability is the rule, non-assignability the exception. See Cal. Civ. Code, Sec. 1044; *LaRue v. Groezinger,* 84 Cal. 281, 283, 24 Pac. 42, where a contract to sell all the grapes grown in a vineyard for ten years was held to be assignable by the grower; *Chandler v. Hart,* 161 Cal. 405, 415, 119 Pac. 516, where an oil lease was held to be assignable by the lessee; 5 Cal. Jur. 2d 283, 39 A. L. R. 1197; *Imperial Refining Co. v. Kanotex Refining,* 29 F. 2d 193, 199, where a contract to purchase all of the oil a lessee would produce from the lease was held to be assignable. Signal could have sold its rights under its arrangement with petitioner to any other casinghead gas contractor who would agree to operate them up to the ten years and offer the contracts back to Bankline when the assignee no longer desired to process the gas. Consequently, Signal could have sold the contract rights at

any time. Its assignee would have the full right to process the wet gas produced under the eight contracts as long as it was possible; namely, for the economic life of such contracts. Such little restriction as there was on the assignability was a condition subsequent and was not onerous and was at the option of Signal or its assignee. As seen above similar restrictions were held not to preclude sales of patents.

Conclusion.

1. Petitioner held the eight casinghead gas contracts for more than six months for use in its trade or business and not primarily for sale to customers.

2. Petitioner's business was that of manufacturing gasoline, propane and dry gas in its plant with the use of capital and labor and it was not a mere renderer of services for hire.

3. Petitioner sold its entire interest in the casinghead gas contracts and is entitled to capital gain treatment on the $85,000 and the $11,351.41 received therefor.

4. Alternatively, petitioner sold approximately a 30% interest in the contracts to Signal for $85,000 and the obligation of Signal to process the balance of the wet gas.

5. Signal was a manufacturer also and as to its interest was not a mere renderer of services for hire, but was manufacturing on its own account.

6. Petitioner is entitled to capital gain treatment on the $85,000 received on the sale of a partial interest in the contracts.

7. The decision of the Tax Court holding that the $85,000 and $11,351.41 constituted ordinary income and not capital gain to petitioner should be reversed.

Respectfully submitted,

MELVIN D. WILSON,

MELVIN H. WILSON,

By MELVIN D. WILSON,

Attorneys for Petitioner.

APPENDIX.

Statutes Involved.

Provisions of the Internal Revenue Code of 1939.

Section 117. Capital Gains and Losses.

(a) Definitions.—As used in this chapter—

(1) Capital assets.—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include—

(A) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;

(B) property, used in his trade or business, of a character which is subject to the allowance for depreciation provided in section 23(1), or real property used in his trade or business; * * *

(j) Gains and Losses from Involuntary Conversions and From the Sale or Exchange of Certain Property Used in the Trade or Business.—

(1) Definition of property used in the trade or business. For the purposes of this subsection, the term 'property used in the trade or business' means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23 (1), held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on

hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or (C) a copy right, a literary, musical, or artistic composition, or similar property, held by a taxpayer described in subsection (a) (1) (C). Such term also includes timber or coal with respect to which subsection (k) (1) or (2) is applicable and unharvested crops to which paragraph (3) is applicable. Such term also includes livestock, regardless of age, held by the taxpayer for draft, breeding, or dairy purposes, and held by him for 12 months or more from the date of acquisition. Such term does not include poultry.

(2) General rule.—If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat, or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. For the purposes of this paragraph:

(A) In determining under this paragraph whether gains exceed losses, the gains described

therein shall be included only if and to the extent taken into account in computing gross income and the losses described therein shall be included only if and to the extent taken into account in computing net income, except that subsection (d) shall not apply.

(B) Losses upon the destruction, in whole or in part, theft or seizure, or requisition or condemnation of property used in the trade or business or capital assets held for more than 6 months shall be considered losses from a compulsory or involuntary conversion.

(c) Alternative Taxes.—

(2) Other taxpayers.—If for any taxable year the net long-term gain of any taxpayer (other than a corporation) exceeds the net short-term capital loss, there shall be levied, collected, and paid, in lieu of the tax imposed by sections 11 or 12 (or, in the case of certain tax-exempt trusts, in lieu of the tax imposed by section 421), a tax determined as follows, if and only if such tax is less than the tax imposed by such sections:

(A) A partial tax shall first be computed upon the net income reduced by an amount equal to 50 percentum of such excess, at the rates and in the manner as if this sub-section had not been enacted.

(B) There shall then be ascertained an amount equal to 25 percentum of the excess of the net long term capital gain over the net short-term capital loss. In the case of any taxable year beginning after October 31, 1951, and before November 1, 1953, there shall be ascertained, in lieu of the amount computed under the preceding sentence, an

amount equal to 26 percentum of the excess of the net long-term capital gain over the net short-term capital loss.

(C) The total tax shall be the partial tax computed under subparagraph (A) plus the amount computed under subparagraph (B).

California Civil Code, Sec. 1044.

All kinds of property.—Property of any kind may be transferred, except as otherwise provided by this article.

Reference to Exhibits

Plaintiff's Exhibit No.	Nature of Exhibit	Page Number Where Identified	Offered	Received	Rejected
11	Contract between Signal Oil and Gas Co. and Southwest Exploration Company	237	238	238	....
12	Contract between Lomita Signal Wilmington Associates and Board of Harbor Commissioners	237	239	239	....
13	Letter dated September 30, 1957	249	250	250	....
14	Revenue Agent's Report dated January 13, 1955	....	259	259	....
15	Journal Entries	276	276	....	276

NOTE: Exhibits 1 to 10 inclusive were included in the Stipulation of Facts which was offered and received in evidence as shown on page 219 of the Transcript. Those exhibits are set out in the Transcript beginning on page 63 and running to page 217 as shown by the Index of the Transcript of Record.

No. 16,201

In the United States Court of Appeals for the Ninth Circuit

BANKLINE OIL COMPANY, PETITIONER

v.

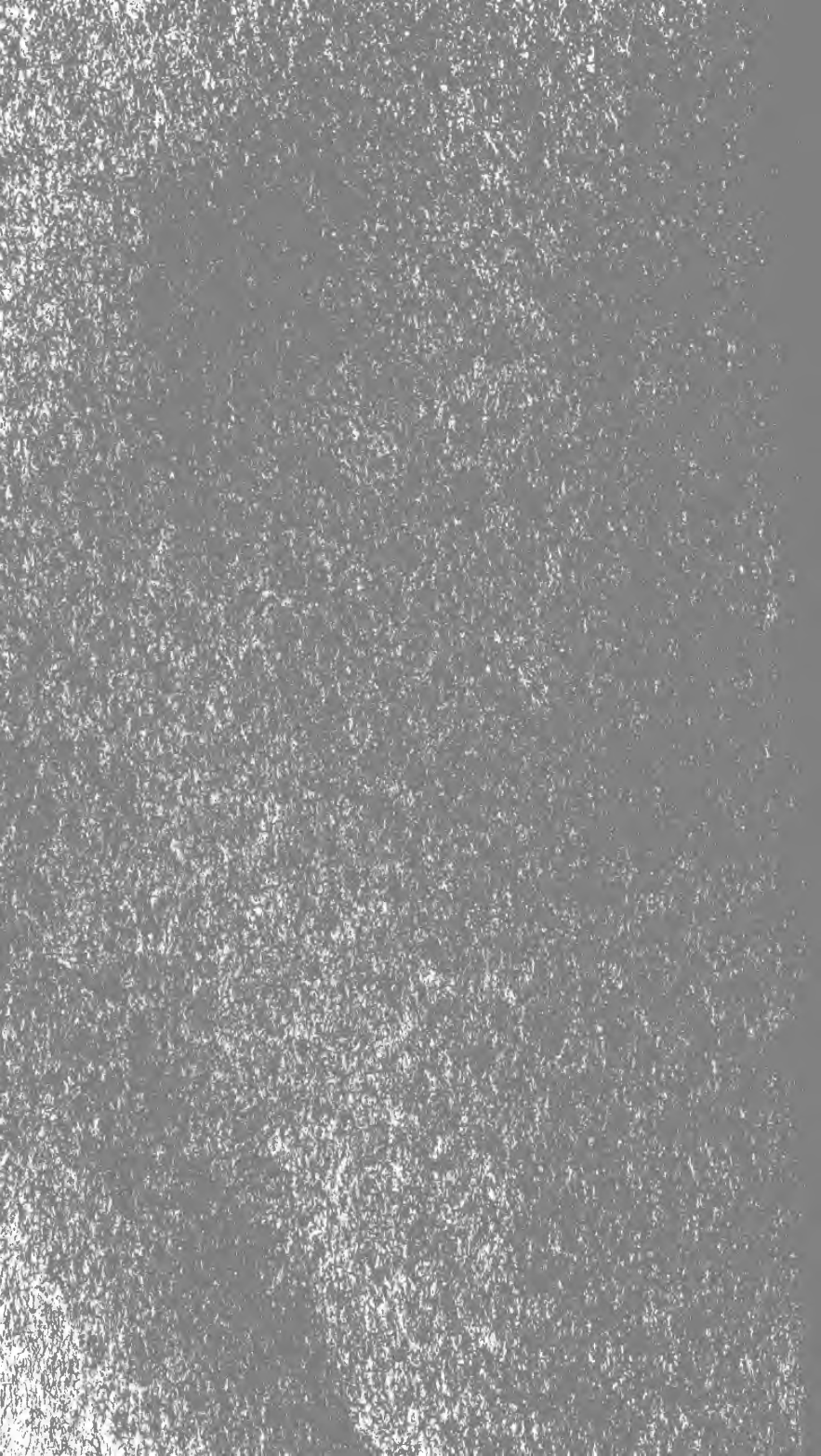
COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition for Review of the Decision of the Tax Court of the United States

BRIEF FOR THE RESPONDENT

CHARLES K. RICE,
Assistant Attorney General.

LEE A. JACKSON,
MYRON C. BAUM,
Attorneys,
Department of Justice,
Washington 25, D. C.



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On Petition for Review of the Decision of the Tax Court of the United States

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 19-44) are reported at 30 T. C. 475.

JURISDICTION

This petition for review (R. 46-54) involves federal income taxes for the taxable year 1952. On October 25, 1955, the Commissioner of Internal Revenue mailed to the taxpayer notice of a deficiency in the total amount of $14,342.52. (R. 11-16.) Within ninety days thereafter and on January 16, 1956, the taxpayer filed a petition with the Tax Court for a redetermination of that deficiency under

the provisions of Section 6213 of the Internal Revenue Code of 1954. (R. 3-10.) The decision of the Tax Court was entered June 5, 1958. (R. 45.) The case is brought to this Court by petition for review filed August 22, 1958. (R. 46-54.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTIONS PRESENTED

1. Was the Tax Court correct in holding that the processing contract of November 1, 1952, was merely an agreement whereby taxpayer employed Signal Oil and Gas Company to process wet gas and that, as agreed compensation for being awarded a contract for processing wet gas at the favorable fees provided, Signal paid taxpayer the sum of $85,000, which was taxable as ordinary income, and not capital gain as taxpayer contends.

2. Was the Tax Court correct in holding that the sum of $11,351.41, received by taxpayer in 1952 as the net proceeds of the processing operations carried on during that year, represented merely its net profit from the sale of processed gas, and hence was taxable as ordinary income, not capital gain as the taxpayer contends.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) [As amended by Sec. 1, Public Salary Tax Act of 1939, c. 59, 52 Stat. 574] *General Definition.*—"Gross income" includes gains, profits,

and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * *

(26 U. S. C. 1952 ed., Sec. 22.)

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *Definitions.*—As used in this chapter—

(1) [As amended by Sec. 210(a), Revenue Act of 1950, c. 994, 64 Stat. 906] *Capital assets.*—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include—

(A) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;

(B) property, used in his trade or business, of a character which is subject to the allowance for depreciation provided in section 23(l), or real property used in his trade or business;

* * * *

(4) [as amended by Sec. 150(a)(1), Revenue Act of 1942, c. 619, 56 Stat. 619, and by Sec. 322(c)(2), Revenue Act of 1951, c. 521, 65 Stat. 452] *Long-term capital gain.*—The term "long-term capital gain" means gain from the sale or exchange of a capital asset held for more than 6 months, if and to the extent such gain is taken into account in computing gross income;

* * * *

(b) [as amended by Sec. 322(a)(2), Revenue Act of 1951, *supra*] *Deduction from Gross Income.*—In the case of a taxpayer other than a corporation, if for any taxable year the net long-term capital gain exceeds the net short-term capital loss, 50 per centum of the amount of such excess shall be a deduction from gross income. * * *

* * * *

(26 U. S. C. 1952 ed., Sec. 117.)

STATEMENT

The facts as found by the Tax Court (R. 20-36), some of which were stipulated (R. 55-63), may be briefly summarized as follows:

Taxpayer is a California corporation with its principal office in Los Angeles, California. During the

years here involved it kept its books and filed its income tax returns on an accrual basis. The taxpayer's business consists of the processing of casinghead gas, or wet gas, derived from the production of petroleum oils into its separate ingredients, namely, natural gasoline, dry gas and propane gas, as well as the operation of a refinery where natural gasoline is blended with other gasoline and after being refined is sold to the public through retail outlets. Taxpayer's refinery is located at Bakersfield, California, and during 1952, and previous years it had processing plants in Santa Fe, Maricopa Springs, and Signal Hill, California. The availability of a supply of gas sufficient to enable a processing plant to operate as nearly as possible to full capacity is an important factor in determining whether operation of such a processing plant may be profitable. (R. 21.)

More than six months prior to November 1, 1952, taxpayer had entered into eight contracts with oil producers for the acquisition by it of casinghead gas produced from drilling operations in the Signal Hill Field. Each of the contracts provided that taxpayer was to install and maintain pipelines from the producers' wells or gas traps to its Signal Hill processing plant; that taxpayer was to install meters on the pipelines in order to keep an accurate account of the gas emanating from the wells of the several producers who agreed to deliver the gas at the pipeline and that taxpayer was to process the gas and pay each producer a stated percentage of the proceeds derived from taxpayer's sale or use of natural gasoline and propane gas extracted by the processing. If a pro-

ducer so desired, he could elect to receive payment in kind. Upon completion of processing taxpayer had the right to sell all of the product not required to be returned to the producer in kind and to pay a fixed percentage of the sale price received. (R. 22.)

Taxpayer had the right to, and did, use natural gasoline extracted by its processing for its refinery and paid the producer a royalty based upon the market price of such gasoline. The natural gasoline used by taxpayer in its refinery was not the same gasoline which resulted from its processing operation at Signal Hill. It obtained the gasoline at its Bakersfield refinery from Standard Oil Company of California through an exchange agreement by virtue of which taxpayer eliminated the cost of transporting gasoline from its processing plant at Signal Hill to the refinery. (R. 22.)

The Signal Oil and Gas Company (hereinafter referred to as Signal), also owned and operated a casinghead gas processing plant at Signal Hill. During the fall of 1952, because of an inadequate source of supply of gas, taxpayer determined that the operation of its processing plant at Signal Hill was unprofitable or likely to become so, and, therefore, sought a profitable method of disposing of its processing plant and equipment. Accordingly, it commenced negotiations with Signal for the sale of its processing plant to the latter. On November 1, 1952, taxpayer sold to Signal its processing plant, pipelines, pipes, meters and fittings at Signal Hill (except the pipelines, pipes, meters and fittings located on properties from which wet gas was being delivered under

the contracts with the producers) together with certain oil leases, interest in lands and gasoline storage and pier facilities in Santa Barbara, California. (R. 23.)

On November 1, 1952, taxpayer and Signal also entered into a separate agreement which was effected by taxpayer's acceptance on that date of an offer of Signal contained in a letter addressed to taxpayer dated October 29, 1952. (R. 23.) This agreement provided in pertinent part as follows (R. 23-26):

> Subject to the conditions and for the considerations hereafter set forth, Signal Oil and Gas Company hereby offers to purchase from you the following properties, to wit:
>
> All leases, gas contracts or other purchase agreements held by Bankline for the purchase or processing of wet gas from properties located in the Signal Hill Oil Field. A schedule of said instruments is hereunto attached and by this reference made a part hereof and marked Exhibit "A".
>
> Signal Oil and Gas Company offers to pay for the above-described properties the sum of $85,000.00, plus further sums of money calculated in the following manner:
>
> Signal shall process said wet gas, or cause said wet gas to be processed, at its plant in the Signal Hill Oil Field or at such other plant or plants as Signal shall hereafter elect, whether or not said plants shall be owned and/or operated by Signal. All dry gas resulting from said operations not required to be returned to the properties from which produced shall be sold by Signal and the net sales price paid to Bankline monthly.

All natural gasoline and LPG Propane extracted by Signal from said wet gas shall likewise be sold by Signal at the average price it receives for like products sold by Signal, and Signal shall pay Bankline monthly a sum of money equal to the sales price of said natural gasoline and LPG Propane, less the following sums, to wit:

> The sum of 2½c per gallon on all natural gasoline and the sum of 1¼c per gallon on all LPG Propane.

Said deductions are based upon the present price of 8.33c per gallon posted by Standard Oil Company of California for 21# R.V.P. natural gasoline in the Signal Hill Oil Field and shall be increased or decreased at the times and in direct proportion to any increase or decrease above or below said price of 8.33c per gallon posted by Standard Oil Company of California for 21# R.V.P. natural gasoline in the Signal Hill Oil Field.

* * * *

This agreement shall remain in full force and effect for the period of ten years from November 1, 1952, and thereafter so long as Signal shall elect. In the event that at any time after ten years from November 1, 1952, Signal shall desire not to receive and/or process the wet gas produced from the properties described in Exhibit "A" it shall give written notice to that effect to Bankline. Within thirty days after said notice Bankline by written notice to Signal may elect to purchase the leases, gas contracts and other purchase agreements herein purchased from Bankline for the sum of $10.00 and have such of said leases and other agreements then remaining in effect reassigned to it, and upon

> notice to that effect Signal shall reassign all of said leases and agreements. In the event Bankline shall not elect to receive such reassignments, then Signal may without further obligation to Bankline sell or assign said agreements to third parties or may quitclaim, surrender or otherwise terminate any or all of them.
>
> * * * *

The contracts described in Exhibit A as referred to in the foregoing agreement were the eight contracts with the producers. (R. 27.)

Pursuant to the above agreement taxpayer, on November 1, 1952, executed an "Assignment" which stated that taxpayer assigned to Signal "all its right, title and interest in, to and under" the eight contracts with the producers previously mentioned. Payment of the $85,000 provided for in the agreement of November 1, 1952, was effected by Signal's execution of a note in that amount, without interest, dated December 1, 1952, which provided for the payment of $4,000 monthly for twenty months and a payment of $5,000 in the succeeding month. This note was paid in accordance with its terms. (R. 27.)

On November 1, 1952, taxpayer and Signal entered into an oral agreement which was reduced to writing on December 1, 1952, in a letter from Signal to taxpayer of that date. (R. 27.) That agreement provided as follows (R. 27-28):

> Reference is made to our letter to you dated October 29, 1952, wherein Signal Oil and Gas Company offered to purchase from you certain leases, gas contracts and other purchase agreements held by Bankline for the purchase or pro-

cessing of wet gas from properties located in the Signal Hill Oil Field, which offer was accepted by you under date of the day of November, 1952.

Signal Oil and Gas Company hereby agrees to sell and deliver to you natural gasoline in monthly amounts equivalent to the amount of natural gasoline extracted by Signal from the wet gas processed by it under the provisions of the above-mentioned letter agreement of October 29, 1952. The term of this agreement shall be ten years from November 1, 1952, and so long thereafter as Signal shall be receiving wet gas produced from the above-mentioned wells.

The sales price of all natural gasoline delivered pursuant to this agreement shall be the average price received by Signal during the month in which deliveries are made for natural gasoline of like quality sold by Signal in the Signal Hill Oil Field.

* * * *

During the negotiations leading to the agreements mentioned Signal decided, for accounting and tax purposes, that its total payment of $135,000 be divided and allocated to the various contracts referred to. Accordingly, $85,000 was allocated to the casinghead gas contracts, $25,000 for the processing plant and equipment and $25,000 for other assets of taxpayer, but as far as either party was concerned the transaction was a "package deal". At first taxpayer was indifferent to the matter of allocation but later it became concerned that the amount allocated to the processing contract might be determined to constitute ordinary income. (R. 28-29.) This concern was

communicated to Signal and as a result the latter, by letter dated December 1, 1952 (R. 29), agreed—

> to indemnify and hold Bankline Oil Company harmless from the payment of any greater United States corporate income tax pursuant to Sections 13, 15 and 430 of the Internal Revenue Code on the receipt of said sum of $85,000.00 than the said income tax calculated on said sales price pursuant to Section 117 of said Code.

Signal dismantled the processing plant which it acquired from taxpayer but connected its main pipeline to taxpayer's line and thus took the wet gas formerly processed by taxpayer to its own plant at Signal Hill. Signal installed a meter on this main pipeline and thereafter accounted to taxpayer for the total gas received. Taxpayer continued to own and maintain the pipelines to the producers' wells and the meters used in connection therewith and made regular meter readings of the gas received from each producer. Taxpayer also remained liable to the producers for the payment or delivery of royalties on the gas obtained from them; taxpayer, therefore, continued to maintain its own royalty records and to compute and pay the royalties due. (R. 29.)

Taxpayer's operations with Signal were generally carried on as follows: All natural gasoline produced by Signal under the contracts with the producers was delivered to Standard Oil Company of California for the account of taxpayer pursuant to an exchange agreement. By direction of taxpayer part of this gasoline was delivered to one of the producers by Standard Oil Company to satisfy taxpayer's obliga-

tion to deliver a royalty in kind under the contract with that producer. Standard Oil then delivered a quantity of natural gasoline equal to the balance remaining to taxpayer at its Bakersfield refinery pursuant to the exchange agreement between taxpayer and Standard Oil Company. (R. 30.)

Signal billed taxpayer for the entire amount of natural gasoline produced from the wet gas processed under the producers' contracts and the amount billed was paid to Signal by taxpayer. Signal thereupon deducted its charge of 2½ cents per gallon from taxpayer's payment and returned the amount remaining to taxpayer. The liquid propane gas produced from the wet gas processed under the producers' contracts was sold to third parties by Signal which received the total sales price. Signal thereupon deducted its charge of 1¼ cents per gallon and remitted the balance to taxpayer. (R. 30.)

With respect to the dry gas, a portion of such gas was returned to the leases as required by the contracts with the producers. If the amount of gas returned exceeded the amounts required under such contracts taxpayer billed the producers directly for such excess and received payment therefor. A portion of such dry gas was also delivered to one of the producers by Signal in order to satisfy taxpayer's obligations to deliver dry gas as a royalty in kind under the contract with that producer. The remainder of the dry gas was sold by Signal to third parties and the entire proceeds were remitted to taxpayer without deduction; there was no charge for processing dry gas. (R. 31.)

Although in the fall of 1952 Signal was not using its total capacity, it was operating its Signal Hill processing plant with an adequate supply of casinghead gas. The processing of the additional gas obtained through taxpayer's contracts with producers would cause only a slight increase in the cost of operation. The gas obtained from taxpayer was unusually rich in that it produced between eight and nine gallons of natural gasoline per 1,000 cubic feet of gasoline. The royalties due under taxpayer's eight contracts averaged about 42 percent of the value of the natural gasoline and propane gas produced from wet gas. The going rate of such royalties in 1952 in the Signal Hill area was about 55 percent. Signal believed that the production of casinghead gas in this field would remain relatively constant for a number of years. (R. 31-32.)

In 1952, the usual charge in the Signal Hill Oil Field for processing wet gas varied between $.0075 and $.0085 per gallon of natural gasoline. At that time a contract to process wet gas in this area was ordinarily characterized by an agreement to extract natural gasoline, propane and dry gas for a fixed price per gallon of gasoline produced. Under such contracts, the extracted products were returned to the owner of the wet gas and no title to such gas was transferred to the processor. Such contracts also normally provided for termination on relatively short notice and it was not customary to pay the processor a bonus for his services. (R. 32.)

On its books Signal treated the November 1, 1952, transaction relating to the eight producers' contracts

as constituting the acquisition of a capital asset and has amortized the amount of $85,000 as the cost thereof. Taxpayer, on the other hand, on its books has treated the same transaction and Signal's subsequent disposition of the products produced as sales of those products and the amounts retained by Signal as the latter's charges for processing. (R. 32.) The oral agreement which was reduced to writing on December 1, 1952, concerning the charge by Signal to taxpayer of the natural gasoline produced from the wet gas under the producers' contracts was cancelled by the parties on October 9, 1957, effective October 1, 1957. (R. 32-33.)

The taxpayer was not engaged in the business of buying and selling casinghead gas contracts. It had no cost or other basis in the eight producers' contracts involved herein. (R. 33.)

The following is a statement computed on an accrual basis showing the results of Signal's and taxpayer's operations for the months of November and December, 1952, and the years 1953, 1954, and 1955, with respect to the eight producers' contracts involved herein. (R. 34):

	1952	1953	1954	1955
Total value of natural gasoline produced by Signal	$30,557.27	$243,189.78	$231,449.15	$228,378.35
Total amount of propane gas sold third parties by Signal	666.73	5,529.09	5,401.10	4,814.48
Total amount received by Signal from sale of dry gas not consumed by oil and gas producers nor by Signal	1,817.14	13,997.25	13,869.17	16,229.30
Total amount of dry gas delivered by Signal as royalty in kind for account of petitioner	942.66	7,201.64	7,129.82	8,226.81
Total amount of dry gas returned to leases in excess of amounts required by leases	57.57	275.55	229.26	227.47
Total	34,041.37	270,175.31	258,078.50	257.876.41
Portion of sales price of natural gasoline and propane gas retained by Signal	10,235.87	79,196.89	75,026.84	74,772.56
Amounts remitted by Signal to petitioner	23,805.50	190,978.42	183,051.66	183,103.85
Royalties paid by petitioner (plus fair market value of natural gasoline and dry gas delivered in kind)	12,454.09	96,488.68	92,048.81	92,638.42
Net amount remaining after petitioner's payment of royalties to producers	11,351.41	94,489.74	91,002.85	90,465.43

In Schedule D of its income tax return for 1952, taxpayer reported a long-term capital gain of $94,-440.84. In an accompanying explanatory schedule taxpayer referred to the sale of four automobiles, two parcels of real estate and some casing on August 31, 1952, and previously during that year. This schedule also referred to a sale on November 1, 1952, of "Signal Hill Absorption plant, State Lease PRC 421, and Bishop Tank farm." The sale price for this item was shown as a single amount of $135,000. Likewise shown in single amounts were depreciation, $973,441.76, cost, $1,013,664.67, and gain, $94,777.09. Concededly, taxpayer's schedule contained nothing to indicate that any of the eight producers' contracts had been sold or that any part of the sales price of $135,-000 had been received for or with respect to any of such contracts. (R. 35.) After a field investigation of taxpayer's liability for 1952, the Commissioner determined that $85,000 of the $94,777.09 reported by taxpayer as long-term capital gain from the sale of the absorption plan, the state leases and the tank farm constituted ordinary income. (R. 35.) In its notice of deficiency the Commissioner gave the following explanation (R. 35-36):

> You reported as long-term capital gain the sum of $85,000 received during the taxable year from Signal Oil and Gas Company under the terms of an agreement dated November 1, 1952, providing for the processing by that corporation of wet gas from certain properties located in the Signal Oil Field District which are covered by your previous agreements with the producers.

> It is held that the sum of $85,000 received in the taxable year constitutes ordinary taxable income under the provisions of section 22 of the Internal Revenue Code of 1939 instead of long-term capital gain as reported on your return.

Under taxpayer's processing arrangement with Signal concerning wet gas obtained from the producers' contract there accrued to taxpayer for the months of November and December, 1952, total income in the sum of $11,351.41. This amount was reported by taxpayer as ordinary income in its tax return for the year 1952 and like income accruing in subsequent years has been similarly reported as ordinary income in the returns for those years. (R. 36.)

The Tax Court overruled taxpayer's assertions that the agreement of November 1, 1952, constituted a sale by taxpayer of its interest in the eight contracts with the oil producers. After reviewing the contract, the operations thereunder and the conduct of the parties with respect thereto, the Tax Court concluded that the substance of the transaction of November 1, 1952, constituted nothing more than an arrangement whereby taxpayer employed Signal for a period of ten years at a fixed or determinable compensation to perform a portion of the work which taxpayer was required to perform under its contracts with the producers. The amount received, $85,000, was a payment by Signal to taxpayer for being engaged to render services for taxpayer. Such an amount does not represent the proceeds of the sale of a capital asset but constitutes ordinary income taxable as such. Similarly, the amount of $11,351.41 received by taxpayer

in 1952 also represented proceeds from the employment contract awarded to Signal and constituted ordinary income. Since both of the amounts in controversy represented ordinary income taxable as such, the Tax Court sustained the deficiency asserted by the Commissioner. (R. 36-44.)

SUMMARY OF ARGUMENT

Taxpayer had contracts with eight oil and gas producers in the Signal Hill Field under which taxpayer was entitled, in substance, to the output of wet gas from the producers' wells, subject to the payment of stipulated royalties in the form of a percentage of the natural gasoline, liquid propane and dry gas which taxpayer processed from the wet gas received. By agreement of November 1, 1952, Signal Oil and Gas Company agreed to process the wet gas received by taxpayer, to deduct specified charges and to remit the remaining proceeds to taxpayer. In the Tax Court, and to some extent here, taxpayer contended that this transaction constituted a sale of its eight producers' contracts and that the consideration it received, $85,000, was entitled to capital gains treatment. The Tax Court disagreed with taxpayer's views and held that the contract was nothing more than an employment agreement under which Signal agreed to process the wet gas for the charges specified and that the sum of $85,000 which taxpayer received from Signal, the stated consideration for the transaction, represented compensation to taxpayer for the reduced amounts it would receive by reason of the favorable processing charges to which Signal was entitled.

The basic question presented on this appeal, therefore, is whether the contract of November 1, 1952, for the processing of wet gas constituted a sale or exchange of a capital asset. In resolving this question we may put aside as irrelevant contentions that taxpayer was a manufacturer and that the producers' contracts constituted capital assets, for they are not dispositive of the issue as to whether any sale occurred. Taxpayer claims capital gains treatment on two items, the $85,000 it received as the consideration for the agreement, and the sum of $11,351.41, the amount realized by it during the two months of 1952 in which the contract was in operation. The items will be considered in the order stated.

I. The decision of the Tax Court that the transaction of November 1, 1952, constituted an employment arrangement, not a sale, was based on detailed findings of fact which may not be set aside unless clearly erroneous. Taxpayer, in fact, does not refer to any evidence which tends to contradict those findings, but apparently prefers to rely on the transaction itself. The circumstances of the contract quickly demonstrate that the Tax Court's appraisal of it as a mere employment arrangement was clearly correct, for here there was no transfer of rights or property as is ordinarily encompassed by a genuine sales transaction. The only right which Signal acquired under the agreement in question was the right to perform services for taxpayer at a specified fee. Nothing more was transferred to Signal, however, nor did Signal acquire any of taxpayer's rights against or obligations to the producers.

The fact that the agreement purports to recite a purchase of the producers' contracts is immaterial, for we are not bound by mere labels, and the agreement itself demonstrates that no sale was intended. Signal was in no sense of the word substituted for taxpayer in its relation to the producers. Signal merely agreed to take the wet gas from taxpayer's lines, process it, deduct the charges specified and remit the proceeds remaining to taxpayer. Although a sale of the producers' contracts is claimed, we find that taxpayer remained liable for the payment of royalties to the producers and that Signal did not even purport to assume any of the contract obligations to the producers. Enlightening also are the provisions of the agreement concerning termination after ten years, wherein it is specified that if Signal wishes to terminate, taxpayer may "purchase" the producers' contracts for $10. These provisions serve to demonstrate that it was the intent of the parties that Signal should not realize any income from the contract in question, apart from its processing charges.

The parties conducted themselves in accordance with the contract, but by a supplemental oral agreement of November 1, 1952, attempted to make it appear that Signal had in reality purchased the producers' contracts. Under that oral agreement taxpayer agreed to purchase all the natural gasoline produced by Signal from the wet gas taken from taxpayer. Although taxpayer paid for the gasoline as provided in the oral agreement, Signal, upon receipt of the payment, merely deducted its processing charge

and remitted the balance to taxpayer. In effect, Signal merely processed the gasoline for taxpayer's account, a fact confirmed by the testimony of taxpayer's president. This fact is also confirmed by taxpayer's books and tax return for 1952 in which the sales proceeds of the processed gas were treated as sales of taxpayer's own products.

It is apparent, therefore, that the contract in question was in fact, as the Tax Court held, an employment agreement and that the payment received by taxpayer was the compensation paid for enabling Signal to realize the highly favorable processing charges provided therein. Such processing charges were three times the normal charges paid for such processing. Though realizing that the transaction amounted to a mere employment, taxpayer and Signal attempted to make it appear as a sales transaction; fearing that the measures taken might not be sufficient, taxpayer demanded and received an indemnity agreement from Signal under which it was saved harmless from the payment of taxes on the transaction at more than capital gains rates. The parties thus demonstrated that the transaction was hardly a sale in form, much less in substance.

In its brief in this Court, taxpayer, for the first time, appears to argue alternatively that the transaction was a sale of a thirty percent interest in its producers' contracts for $85,000. This alternative argument concedes that the remaining sum of $11,351.41 could not be capital gain on that theory. The argument rests on the fact that Signal's agreed processing charge of 2½ cents per gallon for natural gas-

oline was premised upon a gasoline price of 8.33 cents per gallon and was thirty percent of that amount. Taxpayer should not be heard now to present a new argument not presented to the court below and not contained in his statement of points filed with this Court.

In any event, it is obvious that such argument is a mere afterthought created in an effort to salvage some relief from the adverse decision below. The argument contradicts taxpayer's main argument that the entire producers' contracts were sold and there is no evidence in the record to support it. Neither taxpayer's books nor its tax returns support such a theory, for the former do not refer to any fractional interest, or any sale at all, but merely treat the products as still belonging to taxpayer, and the latter do not even refer to the contract in question. The argument is not even supported by simple arithmetic, for a comparison of processing charges and gasoline prices demonstrates that in November and December, 1952, the charges were almost 32 percent of the gasoline prices; taxpayer would hardly contend that it sold a fluctuating percentage interest. On this theory, as on taxpayer's first argument, it must be concluded that taxpayer, after the transaction of November 1, 1952, had exactly the same basic rights as before, the right to the net proceeds of the processed gas. It surrendered only its processing operation, for which it employed Signal at a generous fee, and the sum of $85,000 received from Signal was paid as compensation for the favorable fees Signal was en-

abled to receive. It was thus taxable as ordinary income as the Tax Court properly held.

II. The foregoing arguments also serve to dispose of taxpayer's further contention that it was entitled to capital gains treatment on the sum of $11,351.41, the net proceeds retained by it from sales of processed gas in November and December, 1952. This is necessarily true, for if there was no sale of the producers' contracts, then the $11,351.41 could not form a part of any sales price for such contracts. On its alternative theory, discussed above, taxpayer concedes that it is not entitled to prevail on this item.

In its operations under the processing contract with Signal, taxpayer received what it had previously been entitled to receive, the net proceeds of processed gas, less only processing charges. The processed gas, until sold to third parties, remained taxpayer's property, and upon such sale, the resulting proceeds represented merely profit on the sale of stock in trade, since taxpayer was clearly in the business of selling processed gas. The profit on the sale of stock in trade is, of course, taxable as ordinary income. Since there was no sale of the producers' contracts, the Tax Court correctly held taxpayer not entitled to capital gains treatment on the sum of $11,351.41.

ARGUMENT

I

The Processing Contract of November 1, 1952, Did Not Involve the Sale or Exchange of a Capital Asset; the Sum of $85,000 Received By Taxpayer Thereunder Was Therefore Taxable As Ordinary Income As the Tax Court Held

The basic question presented on this appeal is whether the processing contract of November 1, 1952, involved the sale or exchange of a capital asset, by taxpayer to Signal. That contract in substance provided that Signal agreed to process all the wet gas which taxpayer was entitled to obtain from the oil producers under the eight contracts which it held and that Signal agreed to remit to the taxpayer the entire sales proceeds of the resulting products, retaining only specified processing charges. (R. 23-25.) Taxpayer contended below, and appears to contend here, that this transaction constituted a sale by it of the eight producers' contracts. The Commissioner, on the other hand, contended that the transaction in substance was nothing more than an employment arrangement pursuant to which Signal agreed to process the wet gas for taxpayer, sell the products for taxpayer's account and remit the entire proceeds to taxpayer, retaining only the specified charge for its processing services; the sum of $85,000, the consideration for the transaction, was merely compensation to taxpayer paid by Signal for the awarding of such contract at the favorable fees therein provided. The Tax Court agreed with these contentions and sustained the Commissioner's determination of a deficiency.

Taxpayer, in his brief (pp. 20-23), devotes considerable attention to arguing that it was a manufacturer of the products resulting from the wet gas and that the eight contracts with the producers for the supply of such wet gas constituted capital assets in its hands within the meaning of Section 117(a) of the 1939 Code, *supra*. We need not tarry to consider these arguments at any great length for they shed no light on the issue here presented for determination. That issue stated in its simplest form is: did taxpayer sell its eight producers' contracts to Signal in the transaction of November 1, 1952? In order to answer this question it is completely immaterial whether we call taxpayer a manufacturer or processor of wet gas or the products resulting therefrom or whether it was merely rendering services. Even if taxpayer was a manufacturer, this does not resolve the question as to whether it sold the producers' contracts. Likewise we need not pause to consider whether the producers' contracts may properly be classified as capital assets under the statute, for, if they were not sold, their status as capital assets *vel non* is completely irrelevant.

A. *Taxpayer did not sell its producers' contracts to Signal*

The Tax Court has held that there was no sale of the eight producers' contracts to Signal on November 1, 1952, but that the transaction of that date constituted merely an arrangement whereby Signal agreed to perform services for taxpayer at specified rates. (R. 43.) These rates were very favorable to Signal, and consequently it paid taxpayer $85,000

for the privilege of performing the services, and at the same time compensated taxpayer for the reduced profits taxpayer would realize due to the abandonment of its own processing operation. (R. 43-44.) The decision of the Tax Court was based upon detailed findings of fact entered after a careful review of the evidence. It is those findings which taxpayer in reality is attacking when it contends that the transaction of November 1, 1952, constituted a sale of its contracts with the producers. This is necessarily true, because the Tax Court found that under the contract of November 1, 1952, Signal sold or delivered all of the natural gasoline, propane and dry gas for taxpayer's account and remitted to taxpayer the entire proceeds, deducting only the specified charges for processing natural gasoline and propane. (R. 30-31.) The Tax Court also found that taxpayer remained the owner of the pipelines leading to the producer's wells and continued to be liable to and to pay to the producers the royalties due under the contracts with them. (R. 29.)

These findings do not permit of any other conclusion than that there was no sale of the producers' contracts by taxpayer to Signal, for such facts are inconsistent with an absolute transfer of taxpayer's entire rights and obligations under the producers' contracts as in the case of a true sale. Since the determination of the Tax Court rests upon specific findings based upon a review of conflicting evidence, such findings may not be set aside unless clearly erroneous. Rule 52(a), Federal Rules of Civil Procedure; *United States* v. *Gypsum Co.*, 333 U. S. 364,

rehearing denied, 333 U. S. 869. Indeed, taxpayer does not refer us to any evidence which even tends to contradict the findings of the Tax Court.

Decision of this case need not rest, however, on any technical considerations as to the reviewability of findings of fact, for the findings and conclusions of the Tax Court in this case are supported by such an abundance of evidence that a contrary conclusion would be contrary to plain reason. If we examine the relevant aspects of the purported sales transaction of November 1, 1952, together with the operations and conduct of the parties under that agreement, it becomes quickly apparent that what purported to be a sale was in reality nothing more than an employment agreement under which Signal agreed to perform services for taxpayer. A payment to compensate taxpayer for having awarded Signal the privilege of performing such services at favorable rates is not a payment for the sale of a capital asset, and is thus not taxable as a long-term capital gain under the provisions of Section 117(a)(4) of the 1939 Code, *supra*, but is ordinary income under Section 22(a), *supra*, taxable as such. Under Section 117(a)(4), the word "sale" is to be given its ordinary meaning. *Helvering* v. *Flaccus Leather Co.*, 313 U. S. 247; *Hale* v. *Helvering*, 85 F. 2d 819 (C. A. D. C.). In its ordinary meaning, of course, a sale denotes an absolute transfer of rights for a consideration; it does not denote a transaction under which a consideration is paid but no rights are transferred other than the right to perform services. See *McFall* v. *Commissioner*, 34 B.T.A. 108.

In the transaction here in question the only thing transferred was the right to perform services for taxpayer at a specified fee. Signal acquired none of taxpayer's rights against, or obligations to, the oil producers. Yet that is all that taxpayer had to sell, for we start with the proposition, as the Tax Court noted, that taxpayer had no interest in the gas in place under the decision of the Supreme Court in *Helvering* v. *Bankline Oil Co.*, 303 U. S. 362.[1]

Looking first at the contract of November 1, 1952, we find that the provisions of that contract themselves virtually supply the answer to the question in dispute. It is true that the contract at the outset purports to recite a purchase of the gas contracts. (R. 23-24, 182.) We are not bound by mere labels, however, and must look at the entire contract to determine the true nature of the transaction. *Hamme* v. *Commissioner*, 209 F. 2d 29 (C. A. 4th), certiorari denied, 347 U. S. 954. Under the contract Signal agreed to process the wet gas, to sell the natural gasoline, propane and dry gas resulting therefrom and to pay taxpayer the proceeds realized from such sales, deducting only 2½ cents per gallon of natural gasoline, and 1¼ cents per gallon on liquid propane. No deduction was provided for the proceeds derived from the sale of dry gas and such proceeds were to be remitted to taxpayer in full. This processing arrangement, the contract stated, was to continue for

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[1] That decision dealt with four of the producers' contracts here involved. It is not disputed that the remaining four contracts are substantially the same as those which were before the Supreme Court.

a period of ten years, after which Signal might terminate the arrangement at any time by written notice to taxpayer. In that event taxpayer had the right upon appropriate notice to "purchase" the gas contracts from Signal for the sum of $10. The contract also provided that Signal was to establish connections between its existing pipelines and those owned by taxpayer for the transmission of wet gas and was to install meters in order to enable it to account to taxpayer for the wet gas received at the connection points. (R. 23-26, 182-185.)

It is significant to note that under this contract taxpayer still stood between Signal and the oil producers. Signal did not have the right to take the wet gas directly from the producers' wells nor, in fact, did Signal have any direct dealings with the producers. Taxpayer continued to take the wet gas from the producers in its own pipelines, through its own meters, and to deliver it to Signal at agreed points. Significant, also, is the fact that although taxpayer was required to pay the producers a royalty averaging about 42 percent of the natural gasoline and propane (R. 31) nowhere does the contract state that Signal assumed taxpayer's obligation to make royalty payments or deliveries in kind as required by the producers' contracts. It is a strange sale of contract rights indeed where the seller remains liable under the contracts which it has purportedly sold, and the purchaser does not even purport to assume any of the obligations imposed by such contracts! Nor can we overlook the provisions for termination of the contract whereby, upon Signal's election to terminate

after ten years, taxpayer may "purchase" for $10 the contracts purportedly sold. (R. 26, 184-185.) These are the same contracts which taxpayer would have us believe were originally sold to Signal in 1952 for $85,000.[2]

The significance of these termination provisions is clear. They complete the contract chain which prevents Signal from realizing any income under the contract of November 1, 1952, beyond its processing charge of 2½ cents per gallon for natural gasoline and 1¼ cents per gallon for liquid propane. Not only must Signal remit to taxpayer every penny of the proceeds of these products over and above these charges and the entire proceeds of dry gas sales, but it is not even afforded the opportunity of realizing additional income by reselling the producers' contracts, which it has purportedly purchased, to third parties at the prevailing market price. Signal, under the terms of the contract, is not merely required to give taxpayer a right of first refusal, but a right of first refusal at $10. The effect of all these contract provisions is to make it crystal clear that no

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[2] Taxpayer attempts to explain this provision by asserting (Br. 27), "It may be reasonably inferred from the assignment contract that the wet gas would be completely depleted within ten years". This is sheer speculation, however, and is contradicted by the findings of the Tax Court which include, among other things, a finding that Signal believed the production of casinghead gas in this field would remain relatively constant for a number of years. (R. 32.) In fact Signal's president, Mr. Green, testified that Signal Hill was a "very long-life field" and that "The wells, we figured, would last a considerable length of time." (R. 236.)

producers' contracts were in truth and in fact sold to Signal by taxpayer, but, on the contrary, that taxpayer merely employed Signal to process the wet gas because it had sold its own processing plant.

An examination of the conduct of the parties does not lead to any different result. Signal sold the products, deducted the charges specified in the contract of November 1, 1952, and remitted the entire remaining proceeds to taxpayer. (R. 30-31; Exs. 8-A, R. 205-209.) Taxpayer paid the royalties due under the producers' contracts from these proceeds and retained the balance for its own account. Moreover, the actions of the parties with respect to natural gasoline demonstrate beyond question that they fully realized that the transaction too closely resembled an employment of Signal by taxpayer and that they therefore determined to attempt to give the appearance of a genuine sale to the transaction. This was done by the oral agreement of November 1, 1952, (reduced to writing on December 1, 1952), under which taxpayer agreed to purchase all of the natural gasoline produced by Signal from the wet gas taken from taxpayer's lines. (R. 27-28, 203-204.) This agreement might have had some significance, if it were not for the subsequent conduct of the parties and the provisions of the original agreement of November 1, 1952. Under this oral agreement, Signal did bill taxpayer for the natural gasoline, but the transaction did not stop there. Signal then solemnly deducted its charge of 2½ cents per gallon and returned the balance to taxpayer. (R. 30, Exs. 8-A, 8-B, 8-C, 8-D, R. 205-210.) All that

this transaction amounted to, therefore, was that instead of permitting Signal to sell the natural gasoline to third parties and deduct 2½ cents per gallon, taxpayer used the natural gasoline itself and paid Signal 2½ cents per gallon for processing it.

Apart from the obvious desire of the parties to do everything possible to make the transaction look like a sale, the reason for this strange procedure for the handling of natural gasoline is perfectly obvious. Taxpayer used the natural gasoline in its Bakersfield refinery, but was able to save the cost of transporting it to the refinery by virtue of an exchange agreement with Standard Oil Company of California under which it delivered the gasoline to Standard Oil in Los Angeles and received an equivalent quantity of the same product in Bakersfield. (R. 22, 206.) After the contract of November 1, 1952, Signal merely delivered the natural gasoline to Standard Oil Company for taxpayer's account. (R. 30, 256.)

The true nature of the relationship between taxpayer and Signal and the effect of the transaction of November 1, 1952, is illustrated by the testimony of taxpayer's president, Mr. Aubert. After testifying as to the operation of the exchange agreement just described, Mr. Aubert testified as follows (R. 256):

Q. After you sold your plant in Signal Hill to Signal Oil and Gas Company, how did you get your natural gasoline in Bakersfield?

A. The same way: We asked Signal if they could deliver the natural gasoline to Standard—I mean, we bought the gasoline from Signal, and then instructed Signal to deliver the natural gasoline to Standard for our account. Stand-

ard then delivered the natural gasoline to us in Bakersfield.

* * * *

The significance of this testimony is immediately apparent. It is evident that Mr. Aubert forgot himself and admitted that Signal did not own the natural gasoline which it processed, for, as he states, even after the transaction of November 1, 1952, all that taxpayer had to do was to tell Signal to deliver natural gasoline to Standard Oil under the exchange agreement. Realizing what he had said, Mr. Aubert hastily attempted to correct himself, and, referring to the oral agreement of November 1, 1952, stated that taxpayer purchased the natural gasoline from Signal and then told Signal where to deliver it. We have already seen that this nominal purchase was a pure fiction and that the only effect of that transaction was that Signal was paid 2½ cents per gallon for processing natural gasoline. The testimony of Mr. Aubert abundantly demonstrates that any attempt to treat the processing contract of November 1, 1952, as a sale of the producers' agreements must be dismissed as pure sham. Under that contract Signal owned nothing but the right to process wet gas and to receive processing charges therefor. It did not own the pipelines from the producers, it did not own the product resulting from processing, nor did it assume any of taxpayer's obligations under the contracts which it has purportedly purchased.

Lest there be any doubt upon this point, we need only look to taxpayer's own view of the transaction as reflected in its books of account. In those books,

as demonstrated by a journal voucher attached to the stipulation of facts (Ex. 8-A, R. 205-208), taxpayer treated Signal's sales of the products derived from processing as sales of its own products, and the amounts deducted by Signal were treated as processing charges for natural gasoline and liquid propane. While the entries in such books constitute evidence which is entitled to considerable weight, it is not, of course, conclusive. *Doyle* v. *Mitchell Brothers Co.*, 247 U. S. 179. The Commissioner does not here contend that the entries are conclusive, but he does assert that the absence of any satisfactory explanation for those entries demonstrates that they correctly reflect the true nature of the transaction as contemplated by the parties. In the Tax Court, taxpayer immediately recognized that these entries on its books were inconsistent with its theory of the case and therefore claimed that the entries were erroneous. (R. 42, 222.) It relied on the testimony of Mr. Harrell, a certified public accountant, who was also the vice-president of taxpayer. Mr. Harrell testified that he did not examine the contracts before determining the manner in which the entries should be made on the books. He stated that he was informed by Mr. Aubert, taxpayer's president, that the producers' contracts had been sold to Signal which, after November 1, 1952, would process the wet gas, but that taxpayer would continue to be obligated to pay the royalties to the producers. In view of these facts, according to Mr. Harrell, he set up the entries in taxpayer's books which showed the finished products as belong-

ing to taxpayer and the sales thereof were shown as taxpayer's sales of its own finished products, less processing charges thereon. This was done, he testified, in order to show the gross proceeds or gross value of the products for purposes of accounting to the producers. (R. 266-268.) The same treatment was accorded the sales proceeds on taxpayer's tax return for 1952. (R. 36.)

Conceding that taxpayer owed a duty to the producers to account for the gross value of the processed gas in order to enable them to determine the royalties due, this does not explain why such gross value had to be set up as the value of products owned by taxpayer if the products were already owned by Signal. Nor does it explain why the entries showed the gross value of the products less Signal's processing charges, which were certainly a matter of complete indifference to the producers. The Tax Court correctly evaluated this phase of the controversy when it stated (R. 42-43):

> It is observed that Harrell's testimony offers no explanation as to why, if the contracts had been sold to Signal as he stated he had been advised, he, as a certified public accountant, found it either necessary or desirable to formulate an accounting procedure indicating the contrary merely in order to compute the amounts due the producers under their respective contracts.

The only explanation which may rationally be drawn is that the books did show the sales as sales by taxpayer of its own products because those were the true facts.

Lastly, we cannot overlook the fact that taxpayer was fully aware, at least as early as December 1, 1952, that the processing contract of November 1 of that year might not qualify as a sale or exchange of a capital asset. After communicating its concern to Signal, the latter agreed to indemnify taxpayer in the event that the latter should be required to pay tax on the $85,000 at more than capital gains rates. (R. 28-29; Ex. 5, R. 188.) This agreement, it would seem, supplies the motive for the entire transaction and the key to its solution. Taxpayer had valuable contracts with the producers giving it a supply of rich gas but it no longer wished to process such gas itself; having determined to allow Signal to do such processing, it was quickly realized that a mere contract which would employ Signal as the processor, a contract for which Signal was willing to pay, would merely result in the receipt of ordinary income. Cf. *General Artists Corp.* v. *Commissioner*, 17 T. C. 1517, affirmed, 205 F. 2d 360 (C. A. 2d), certiorari denied, 346 U. S. 866. Hence, it was decided that Signal would compensate taxpayer for the reduced income it would receive by permitting Signal to process the wet gas at high processing charges, but that the compensation would be cast in the form of a purchase of the producers' contracts for tax purposes. Even after this was done, however, it is manifest that taxpayer lacked confidence in the eventual success of the arrangement, and therefore demanded that Signal extend to it this additional indemnity in the event that taxpayer was taxed at more than capital gains rates.

This explanation is consistent with the entire transaction. It may be suggested, however, that if this theory be correct, why was Signal willing to pay $85,000 for a contract under which it was to perform work for which it was to be compensated? The answer is clear: Under the contract Signal was to receive processing charges of 2½ cents per gallon on natural gasoline and 1¼ cents per gallon on liquid propane, when the going rate for such processing was only approximately ¾ of a cent per gallon of natural gasoline. (R. 32, 241.) Signal paid $85,000, therefore, for the privilege of obtaining a contract under which it would receive three times the normal processing charge for natural gasoline and for a contract which was not terminable on short notice, as was customary. Signal did not suffer financially from this arrangement because, as the Tax Court noted, it amortized the $85,000 as the cost of the contract (R. 32), and in addition recouped that amount by the excess of the agreed processing charges over the customary charges.

The factors summarized lead inescapably to the conclusions that the entire transaction under review was not a sale of anything, but was merely an arrangement whereby Signal was employed by taxpayer to process wet gas under a contract which was so favorable to Signal that it was willing to pay a cash consideration for the privilege. The amount taxpayer received from Signal, however, was not paid on the sale or exchange of a capital asset for no capital asset was sold; it constituted compensa-

tion which must be taxed as ordinary income. As the Tax Court aptly stated (R. 43):

> From a consideration of all of the evidence bearing on the character of the transaction of November 1, 1952, between petitioner and Signal, we are of the opinion that the total effect or substance of the transaction was merely an arrangement whereby petitioner employed Signal for at least a period of 10 years and at a fixed or determinable compensation to perform a portion of the work or services required of petitioner by the eight producers' contracts and which portion the petitioner theretofore had performed. * * *

This case in many respects presents a striking analogy to the situation considered by the Court of Appeals for the Fourth Circuit in *Hamme* v. *Commissioner*, *supra*. In that case the taxpayers executed leases of mineral lands, then two years later "bargained and sold" the lands to the lessee in fee simple, subject to the condition that the lessee would pay royalties as provided in a contract of the same date and, in the event of default, that the lessee would reconvey the lands to the taxpayer. Notwithstanding the use of words of sale and of termination of ownership, the court in that case held that the substance of the transaction was nothing more than a lease and that the amounts received were taxable as ordinary income. In the present case, as in *Hamme*, the true substance of the transaction which emerges is that there was no sale, despite all attempts of the parties to use language which might indicate a sale. Since we must look to the substance

and not to the form employed (*Commissioner* v. *P. G. Lake, Inc.*, 356 U. S. 260), it must be concluded that there was no sale or exchange of the producer contracts here in question and that the $85,000 received was, as the Tax Court held, properly taxable as ordinary income.

B. *Taxpayer did not sell a thirty percent interest in the contracts with the producers*

In the Tax Court, taxpayer relied upon the contentions discussed by that court and by the Commissioner in the preceding portions of this brief, namely, a sale of its entire interest in the producers' contracts. In the argument portion of its brief in this Court, however, taxpayer refers to this theory in only one paragraph. (Br. 24.) The balance of its argument is devoted to the contention that the parties kept their books on the basis of a sale of a thirty percent interest in such contracts to Signal and that, if taxpayer is bound by the Tax Court's findings, it is entitled to capital gains treatment on the $85,000 payment, but not on the amount of $11,-351.41, on the theory of a sale of a thirty percent interest. In its summary of argument and conclusions (Br. 19, 30), on the other hand, taxpayer refers to the thirty percent theory as an alternative argument. It will therefore be discussed herein on that basis, namely, an alternative argument which has been advanced in this Court for the first time in this proceeding.

It is well settled that an appellant may not raise issues is the appellate court which he had not argued

in the court below. *Hormel* v. *Helvering*, 312 U. S. 552. Taxpayer cannot go to trial on one theory and then, when unsuccessful, seek to upset the trial court's determination on review upon a ground not presented to it. Taxpayer should, therefore, not be heard at this time to contest the Tax Court's decision upon a new ground not previously urged. At best, he is entitled to no more than a remand of the case in order to enable the Tax Court to consider this issue. A remand, however, would appear to be a futile gesture in the present situation, since the Tax Court's decision is clearly correct, as noted below.

Moreover, taxpayer's attempt to argue this point for the first time in his brief is in direct violation of Rule 17(6) of the Rules of this Court which requires taxpayer to file a statement of the points on which he intends to rely and provides that this Court "will consider nothing but * * * the points so stated." Taxpayer's petition for review (R. 46-54) filed August 22, 1958, contains a statement of numerous points on which it intends to rely, and taxpayer subsequently, on September 12, 1958, filed a statement of points adopting the prior statement filed (R. 279.) In neither of these documents, however, is any reference made to an argument that the transaction in question constituted a sale of a thirty percent interest, and such argument should not be permitted to be advanced at this stage of the proceedings.

Even if we examine the argument on its merits, it is obvious that taxpayer's assertion that the $85,-

000 was paid only for the sale of a thirty percent interest in the producers' contracts is an afterthought created out of thin air. It is an argument which plainly contradicts taxpayer's main position, for the contract itself plainly states that Signal agrees to pay $85,000 for the "gas contracts or other purchase agreements" held by taxpayer. (R. 24, 182.) There is nothing contained therein which refers to thirty percent of such contracts or agreements. Moreover, taxpayer argued in the court below, in an attempt to make the transaction into a sale, that the sales price was $85,000 plus the net proceeds of the products resulting from the processing of wet gas. His thirty percent sale theory requires an abandonment of that argument, because under that theory Signal paid $85,000 for the privilege of receiving the amount of 2½ cents per gallon on natural gasoline and 1¼ cents per gallon on liquid propane. This figures out to a thirty percent purchase, says taxpayer, because 2½ cents is thirty percent of the stipulated price of 8.33 cents, the price used as the basis for computing the deductions due Signal. (R. 25.)

The short answer to this entire argument is that there is not a shred of evidence which indicates that taxpayer was purchasing a partial interest in the producers' contracts, nor is there any indication of such a transaction in the contract itself, in the records kept by the parties or in their operations. It is noteworthy that if this theory be adopted, the amount of $11,351.41 received in 1952, on which taxpayer also claims capital gain treatment, and the amounts received in succeeding years as the net pro-

ceeds from the sale of processed gas, admittedly become proceeds from the sale of taxpayer's own product and could not be treated as capital gains. It is apparent that taxpayer has made this argument in a feeble attempt to salvage something from the adverse decision of the Tax Court.[3]

Taxpayer is in error when it states (Br. 24) that the parties have treated the transaction on their books and in their tax returns as a sale of a thirty percent interest. There is no evidence to support this bare assertion. Signal's books and returns are not before the Court, and taxpayer's books and 1952 tax return, which are in the record (Exs. 6, 8-A, R. 189, 205-208), do not contain any evidence of a sale of any interest, thirty percent or otherwise. The books, as has been noted, treat the products derived from the processing of wet gas as taxpayer's own, thus negating any sale entirely; the tax return, as has also been noted, merely refers to a sale of the processing plant, oil leases and tank farm for $135,000, without mentioning the producers' contracts. This can hardly be deemed evidence of a sale of a thirty percent interest. The fact that Signal may have amortized the $85,000 and may have treated the proceeds remitted to taxpayer as royalties, as

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[3] Taxpayer's citation of cases involving partial assignments of patents (Br. 26) is wholly inapposite. Such cases merely hold that a partial interest in a patent, that is, one limited to a particular geographic area or a particular industry, are *pro tanto* complete assignments of the patent. The citation of these cases here, however, merely begs the question whether such a partial assignment was ever made.

taxpayer suggests (Br. 13, 25), does not help taxpayer, for such treatment is consistent with a lease, or with a mere employment contract for processing, under which only the actual processing charges are includible in gross income. To the extent that Signal's books may have included the total proceeds in gross income, it is entitled to deduct the amounts belonging to taxpayer and remitted to it, thus leaving as taxable income only the processing charges received. It is hardly consistent with a sale for the purchaser to retain only a small processing charge and to remit the entire balance of the sales proceeds to the seller as "royalties".

Finally, taxpayer's theory of a sale of a thirty percent interest runs aground on the shoals of simple arithmetic. He premises the argument upon the fact that Signal's contract deduction was 2½ cents per gallon which is thirty percent of the assumed price of 8.33 cents per gallon. (Br. 24.) But, as we note from Exhibit 8-A (R. 205-208), the price of gasoline in November and December, 1952, was 10.28 cents and Signal's charge was 3.25 cents which is almost 32 percent of the price of the gasoline. Taxpayer can hardly argue that Signal bought a fluctuating percentage interest, the quantum of which varied with the market price of natural gasoline.

Under taxpayer's eight contracts with the producers and before the contract of November 1, 1952, taxpayer obtained the wet gas from the producers' wells, processed it and sold or retained for its own use the resultant natural gasoline, liquid propane and dry gas using the proceeds to pay the royalties

due the producers and retaining the balance. After the processing contract with Signal on November 1, 1952, taxpayer still obtained the wet gas from the producers' wells and received the proceeds from the resultant products, using the proceeds to pay the royalties due the producers and retaining the balance. Signal was substituted for taxpayer in processing the wet gas and in selling it, but taxpayer continued to receive the proceeds. As the Tax Court correctly described the situation (R. 40):

> * * * it is clear that on and after November 1, 1952, the petitioner performed part of the work or services required under the producers' contracts and Signal performed part of such work or services, with petitioner performing the initial and final portions and Signal performing the intermediate portion.

The only change which was effected by the transaction of November 1, 1952, was that taxpayer paid Signal (or permitted it to deduct) a processing charge in lieu of performing the processing operation itself. This can hardly be described as a "sale" of the producers' contracts to Signal, or even a "sale" of a thirty percent interest therein. The transaction was merely an employment arrangement whereby Signal was retained as the processor for a specified fee. As the Tax Court properly stated, however, (R. 43): "arrangements whereby one is engaged to render services to or for another are not capital assets." The proceeds of such arrangements are not derived from the sale or exchange of capital assets and must therefore be taxed as ordinary in-

come. The sum of $85,000 paid to taxpayer by Signal for entering into such an arrangement was merely a payment made to taxpayer to compensate it for the reduced proceeds it would receive by reason of having to pay Signal's high processing charges and to compensate it for awarding the contract for such processing to Signal; the Tax Court was therefore clearly correct in holding such sum taxable as ordinary income.

II

The Sum of $11,351.41 Received By Taxpayer from the Sales Proceeds of the Processed Gas Was Also Properly Included In Ordinary Income

In the same single paragraph of its argument in which it refers to a sale of the entire interest in the producers' contracts (Br. 24), taxpayer claims it is also entitled to capital gains treatment on the sum of $11,351.41, which represents the net proceeds retained by taxpayer in the months of November and December, 1952, from the processing of wet gas and the sale of the resultant products. When it proceeds to the alternative theory of a sale of a thirty percent interest, however, taxpayer expressly concedes (Br. 24) that it is "not entitled to the capital gains treatment" on the sum of $11,351.41. In view of this concession, therefore, we need discuss the proper tax treatment of the sum of $11,351.41 only in the original theory advanced by taxpayer, namely that there was a sale by taxpayer of its entire interest in the producers' contracts.

What has been said in the preceding portions of this brief, in discussing whether the processing con-

tract of November 1, 1952, was a sale of taxpayer's entire interest in its contracts with the producers and whether taxpayer was entitled to capital gains treatment on the $85,000 received, is applicable with equal force to the sum of $11,351.41 here under discussion. If there was no sale and the sum of $85,000 therefore did not represent the sale price for taxpayer's entire interest in the producers' contracts, surely the $11,-351.41 retained by it from the sales proceeds of processed gas could not be deemed part of a non-existent sale price either. On this aspect of the matter, moreover, the lack of substance to taxpayer's theory of a sale of its interest in the producers' contracts becomes more readily apparent.

Under the processing contract of November 1, 1952, Signal, as we have seen, "sold" the natural gasoline to taxpayer and sold the propane and dry gas to third parties. (R. 30-31.) From the proceeds thus derived, Signal first deducted its agreed charges of 2½ and 1¼ cents per gallon on natural gasoline and liquid propane, respectively, and remitted the balance to taxpayer, which then paid its royalty obligations to the producers and retained the balance for itself. In the two months of 1952, during which the processing contract with Signal was in operation, taxpayer realized the sum of $11,351.41.[4]

Taxpayer thus received what it had been entitled to receive before its contract with Signal—the net

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[4] As may be noted from the Tax Court's findings, taxpayer similarly realized $94,489.74 for the year 1953, $91,002.85 for the year 1954, and $90,465.43 for the year 1954. (R. 34.)

profit realized from the sale of the processed gas in its various forms. If the wet gas or processed gas remained taxpayer's property until sold to third parties, such net profit became merely the net profit from the sale of stock in trade, inasmuch as taxpayer clearly was engaged in the business of selling processed gas in its several forms.[5] We have noted that nowhere in its brief does taxpayer assert that the wet gas or processed gas became Signal's property. It properly refrains from doing so in view of the evidence that such gas was processed and sold for taxpayer's own account. Even as to the natural gasoline which Signal ostensibly "sold" to taxpayer under the oral agreement of November 1, 1952 (R. 22-28, 203-204), the evidence shows that Signal deducted its charge of 2½ cents per gallon from the amount paid by taxpayer and promptly remitted the balance to taxpayer (R. 30, Ex. 8-A, R. 205-208). In view of the evidence that the sales of processed gas were carried on its books as taxpayer's own sales (R. 41-42) and reported as such for income tax purposes (R. 36) and that taxpayer, as Mr. Aubert, its president, testified (R. 256), merely directed Signal to deliver the natural gasoline to Standard Oil Company under taxpayer's exchange agreement, it is apparent that neither the wet gas nor the processed gas ever became Signal's property.

Since it appears that taxpayer did not intend to, and did not, sell its entire interest in the contracts

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[5] The natural gasoline was sold in the form of blended gasoline after passing through taxpayer's refinery. (R. 21-30.) It thus remained part of taxpayer's stock in trade.

with the producers to Signal, but merely employed Signal to process the wet gas which taxpayer received, it is apparent that the sum of $11,351.41, the net proceeds realized from the sale of natural gasoline, liquid propane and dry gas in 1952, represented merely taxpayer's profits from the sale of its stock in trade. As such it is taxable as ordinary income, as any other merchant's sale of inventory. If taxpayer presses its alternative theory that there was a sale of a thirty percent interest in its producers' contracts, then concededly the $11,351.41 was not part of the sales price, but represented the profit derived from the seventy percent interest in the products retained by taxpayer. Under either theory, therefore, taxpayer is not entitled to capital gains treatment on that sum.

CONCLUSION

The decision of the Tax Court was correct and should be affirmed.

Respectfully submitted,

CHARLES K. RICE,
Assistant Attorney General.

LEE A. JACKSON,
MYRON C. BAUM,
Attorneys,
Department of Justice,
Washington 25, D. C.

APRIL, 1959

☆ U. S. GOVERNMENT PRINTING OFFICE. 1959 503680 1355

No. 16201

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BANKLINE OIL COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

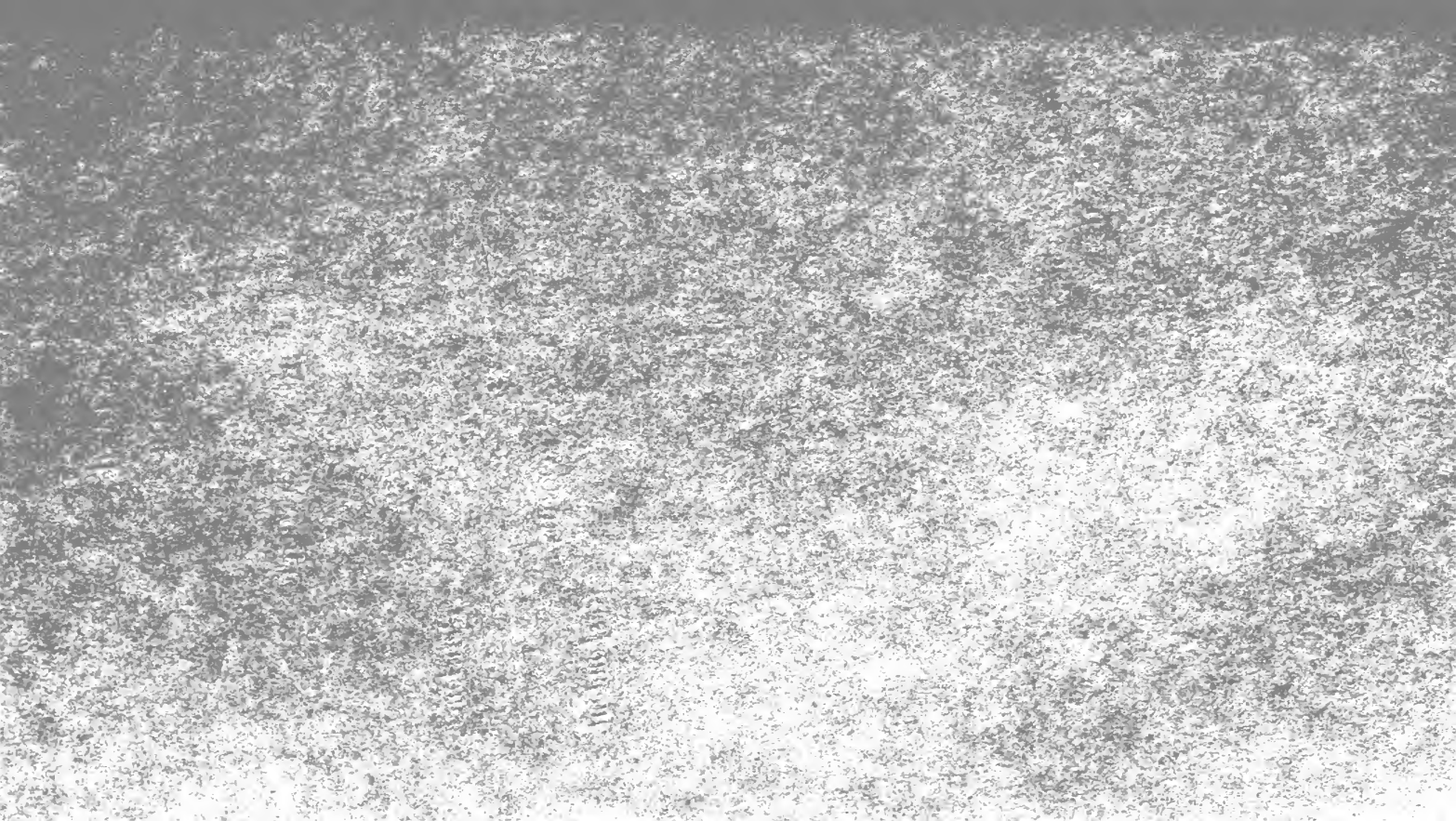
Respondent.

Petition for Review of Decision of the Tax Court of the United States.

REPLY BRIEF FOR THE PETITIONER.

MELVIN D. WILSON,
MELVIN H. WILSON,
621 S. Hope Street,
Los Angeles 17, California,
Attorneys for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.



TOPICAL INDEX

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REPLY BRIEF FOR THE PETITIONER.

Comments on Respondent's Statement of the Case.

The Tax Court and the respondent have in their statement of the case used, in place of facts, conclusions of law or fact. For example on page 11 of his brief, the respondent says:

> "All natural gasoline produced by Signal under the contracts with the producers was delivered to Standard Oil Company of California *for the account of taxpayer* pursuant to an exchange agreement." (Emphasis supplied.)

This expression is misleading since it ignores the fact that petitioner bought the gasoline from Signal and di-

rected Signal to deliver it to Standard Oil Company rather than to petitioner. [See Ex. 7, Tr. 203, 204.]

On page 12 of his brief, respondent quoting the Tax Court said that:

> "Signal thereupon deducted its charge of 2½¢ per gallon from taxpayer's payment and returned the amount remaining to taxpayer."

Signal bought the wet gas from the producers, converted it into gasoline, propane and dry gas, sold the gasoline to petitioner, and the propane and the major part of the dry gas to others and billed the buyers for the gasoline and propane and dry gas and received the amounts thereof. Signal paid 100% of the dry gas proceeds to petitioner and paid to petitioner 70% of the sale proceeds of the gasoline and propane, pursuant to Exhibit 3. [Tr. 182-185.]

On page 12 of his brief the respondent made the same type of comment concerning the liquid propane gas and the same objection is made.

On pages 16 and 22 of his brief, the respondent points out that petitioner in its tax return for 1952 did not refer to the sale of the eight casinghead gas contracts. Since the contracts cost petitioner nothing, no investment therein appeared on its books. [Tr. 57, par. 8.] Hence, there was nothing to deduct on its tax return, so the full $85,000 received in the "package deal" was reported as long-term capital gain.

The Commissioner's representative had no trouble, however, in ascertaining that $85,000 was reported as the

sale price of the eight casinghead gas contracts. [Tr. 14-15, 269.]

Of course, the purported fact finding in the respondent's brief near the bottom of page 17 that the $85,000 was a payment by Signal to taxpayer for being engaged to render services to the taxpayer is a pure conclusion of law and is not supported by the evidence.

On pages 22 and 43 of his brief, respondent makes a point of the fact that the percentage of the proceeds of the sale of gasoline and propane which Signal was permitted to keep started out to be 30% but by December of 1954 it had become "almost 32%."

Respondent, however, overlooks the fact that Exhibit 3 fixes Signal's share at 2½¢ when 21# RVP natural gasoline in the Signal Hill Oil Field sells at 8⅓¢ per gallon. [Tr. 182.] Now, by December 1954 the RVP (*Reed* vapor pressure) of natural gasoline sold by Signal was 28#, and the price was 10.28¢. This resulted in Signal's share being $.032563025 instead of $.025. [Tr. 205.] In other words, when the vapor pressure of the natural gasoline varies, the price varies, and Signal's share varies percentage-wise. That is why throughout petitioner's original brief it referred to the interest which it sold to Signal as approximately 30%. Consequently, where on page 22 of his brief, the respondent says that "taxpayer would hardly contend that it sold a fluctuating percentage interest," he is in error. It did so, as the interest depended upon the vapor pressure of the gasoline.

Respondent, on page 42 of his brief, contests the statement made by petitioner on page 24 of its brief that the parties have treated the transaction on their books and tax returns as a sale of approximately a 30% interest and the reservation by petitioner of the balance of the rights under the casinghead gas contracts. It is believed that petitioner's brief, pages 24 and 25 wholly supports its said statement and that the parties have treated the transaction as a sale of a 30% interest in the contracts.

Respondent argues on pages 28 and 29 of his brief that Signal did not assume petitioner's obligations to make royalty payments in kind or otherwise to the gas producers, but as shown in Exhibit 3 [Tr. 184], Signal agreed that "such procedures of metering, testing and accounting (which it uses) shall conform with the provisions of the agreements described in Exhibit A, as modified from time to time by usages and customs in the industry." This certainly included the "accounting" responsibility for paying royalties in kind. As shown on page 182 of the Record, Signal bought the leases, contracts and other purchase agreements held by petitioner and they were specifically described in Exhibit A and by reference made a part of the agreement. Petitioner's sale price (and Signal's cost) of the contracts included the amounts payable to the gas producers, since Signal agreed to pay such amounts to petitioner, even though petitioner was not released from its liability to pay such royalties.

ARGUMENT.

I.

The Tax Court Erred in Holding That Petitioner's Alleged Motive in Getting Capital Gain Treatment on the $85,000 Induced the Parties to Make the Form of the Contract Vary From the Substance.

The predominating viewpoint in the Tax Court's opinion and respondent's brief, is that petitioner in substance employed Signal to process petitioner's wet gas, but in order for petitioner to get capital gain treatment on $85,000, petitioner couched the transaction in the form of a sale of the wet gas contracts for $85,000 and agreed to pay Signal an excess processing fee for each year of the anticipated ten-year term. In other words, respondent says that because of a tax avoidance motive the substance of the contract was different from the form.

Now let us see how this idea works out. The estimated production of the contracts as of the date Exhibit 3 was signed, November 1, 1952, was 2,326,875 gallons per year. On page 235 of the Transcript, Mr. Green testified that the gas volume from the eight contracts was about three quarters of a million cubic feet of gas per day and that the gasoline content for one thousand cubic feet of gas was between eight and nine gallons. This would work out to be 6,375 gallons per day or 2,326,875 gallons per year.

The normal processing charge was $.0075 per gallon [Tr. 241], whereas Sgnal was to keep $.025 per gallon [Tr. 183] ($.0175 more than the above $.0075). The excess processing charge paid by petitioner to Signal, according to respondent, was therefore $.0175 times 2,326,875 or $40,720.31 per year. On a ten-year level production basis the excess processing charge to be paid by petitioner to Signal, according to the respondent, would therefore be

in the neighborhood of $407,000. Now, for this excess payment petitioner received $85,000, according to the respondent. This does not look like a good bargain for petitioner nor one that businessmen would make unless there was an exceedingly strong tax motive.

What was the tax motive for making the excess payments? To save 26% of $85,000 or $22,100, according to respondent. This is less than one year's alleged excess processing fee or charge.

Respondent claims that the form of the contract relating to the casinghead gas contracts was a sham and unrealistic and different from the substance, because petitioner had a tax motive.

But the alleged tax motive as suggested by the respondent appears unrealistic and ridiculous and worth nowhere near the price petitioner paid for it, as alleged by respondent. It will be noted that petitioner did not in its returns, claim capital gain treatment on the further net amounts it received from petitioner under Exhibit 3. [Tr. 270.]

Mr. Aubert, the President of petitioner, testified that petitioner was selling the casinghead gas contracts to Signal, along with some other capital assets, for $135,000 and further amounts to come out of production. He said that he never discussed with Mr. Green, or Signal or anyone the matter of giving Signal a job of processing petitioner's gas and getting a bonus from Signal for the contract. [Tr. 247.] Mr. Green testified to the same effect. [Tr. 240.] Petitioner reported in its tax returns, and evidently always intended to report the full $135,000 as a sale of capital assets. In negotiating the sale it did not consider that it had any tax avoidance motive in the matter.

Signal had a mild tax and accounting motive, namely, that of breaking up its total cost of $135,000 into land, depreciable buildings and equipment and amortizable contracts. These elements all had different lives and it was incumbent upon Signal to allocate the purchase price over these elements for accounting and tax purposes. Compare *Signal Gasoline Corporation,* 25 B. T. A. 861, Item 4. Now while Signal's tax motive was mild and proper, to get the allocation of costs, it was willing to give the indemnity agreement that petitioner would be accorded capital gain treatment on the $85,000.

If it had been petitioner's motive to get a tax avoidance benefit, petitioner should have given Signal the better of the bargain. As the transaction actually occurred, petitioner got the better bargain as it got the indemnity agreement and 70% of the gasoline and propane and 100% of the dry gas, plus $85,000 for the casinghead gas contracts, the going rate for which was normally only 55% of the production.

If petitioner had any tax avoidance purpose to serve through the *form* of this transaction, then it was very thoughtless or inconsistent in its bookkeeping methods. As pointed out by the respondent, petitioner kept its books practically as it had before the transaction with Signal and did not keep them consistently with the form of Exhibit 3.

Petitioner always expected to report the $135,000 as proceeds from the sale of capital assets and only took the precaution that the allocation requested by Signal would not upset that treatment. As stated before, petitioner has never treated the amounts received from Signal, under the terms of Exhibit 3, other than $85,000, as long-term capital gain. Consequently, the only tax motive that

could possibly be imputed to it was a desire to get long-term capital gain on $85,000. Since this benefit is limited to 26% or $22,100 it is inconceivable that petitioner would give to Signal a bargain of over $40,000 a year or a total of around $400,000, to get this small tax benefit. To suggest therefore that the form of the transaction differed from the purpose so that petitioner could save a tax of $22,100 through paying $400,000 therefor is utterly absurd.

The respondent has imputed a motive to petitioner's officers and directors which would clearly indicate that they were improvident and incompetent. The respondent has built his whole case on the proposition that petitioner, for $85,000, agreed to give Signal an excess processing fee of $40,000 per year for a period which was expected to run for at least 10 years. The alleged purpose of making this improvident contract was that it was hoped it would save petitioner $22,100 in taxes.

That the officers and directors of a multi-million dollar oil company would enter into such an improvident contract is unreasonable, hence, the backbone of the respondent's case is based on an absurd premise.

If petitioner's officers had had such a tax motive as suggested by respondent, they surely would have kept their books and filed their tax returns so as to bear out that premise. Since they were innocent of any such ridiculous tax motive, their bookkeeping was dominated by a desire to show their liabilities for royalties to gas producers. The bookkeeping method used, completely negatived any tax conscious motive.

It is hardly conceivable that the petitioner's officers would have stretched so far to try to save a $22,100 tax

and then been negligent in failing to keep the books in a manner that would have supported that tax motive.

The facts of the matter are that petitioner and Signal had properties in two places which would be more valuable if combined in one ownership. Petitioner negotiated to sell all of such properties to Signal—a lease, tanks, a pier in Santa Barbara County, a casinghead gas plant and its wet gas supply contracts in Signal Hill. All of these items were capital assets and petitioner expected to treat them as such on its tax returns.

The contract of sale would be mutually advantageous to the two parties. Petitioner had very little use for the property in Santa Barbara County, whereas Signal did. On Signal Hill again petitioner had a declining use for the assets whereas Signal could use them to advantage.

All of the assets were easily capable of evaluation excepting the casinghead gas contracts in Signal Hill. The value of those contracts depended upon future production. It was customary in the sale of such contracts to base the ultimate sale price on ultimate production. At Signal Hill another little complication was present. The gas gathering lines of petitioner were old and some of petitioner's employees who serviced them were old. Signal did not want to take over the responsibility for either of these matters. Consequently petitioner sold and Signal bought an interest in the casinghead gas contracts and petitioner reserved an interest in them and assumed the responsibility for keeping up the gas gathering lines and retaining the ageing employees.

Petitioner anticipated no particular tax problems in treating the $135,000 as received in a sale of capital assets. It was only when Signal wanted to segregate that amount among the different classes of assets being pur-

chased that petitioner became disturbed. It was not sure of the valuation being put on the casinghead gas contracts by Signal, and it possibly knew that the government litigates capital gain treatment on patents and other rights where the payments are based on continuing operation or production. Consequently, it demanded the indemnity agreement, as to the $85,000 only.

But even then petitioner did not show any tax consciousness in its bookkeeping. Its bookkeeping was dominated by its necessity of showing the basis of the royalties payable to gas producers, and not by any tax avoidance motive.

Courts might put a different interpretation on the contract between petitioner and Signal with respect to the casinghead gas contracts, but no reasonable person could impute such a ridiculous intent to petitioner's officers as has the respondent and the Tax Court. Without any contradiction, the officers of petitioner and Signal testified that they negotiated the sales of the gas contracts and never discussed petitioner's employing Signal to process the gas for it, and most certainly did not discuss the utterly ridiculous idea of petitioner agreeing to pay Signal an excess processing fee and receiving in its place compensation therefor, all for the purpose of getting capital gain treatment on such compensation.

This case should be stripped of any tax consciousness or tax avoidance ideas or motives. When so stripped we can get down to the basic problem of whether petitioner sold the contracts for $85,000 and later payments or an interest in the contracts for $85,000.

II.

The Casinghead Gas Contracts, or an Interest in Them Was Sold to Signal.

It is clear that the casinghead gas contracts were capital assets in the hands of petitioner and that they became capital assets in the hands of Signal. It is also a manufacturer and casinghead gas operator.

Signal received from petitioner the exclusive right to use the wet gas supply contracts for their entire life. Signal could assign the contracts and receive consideration therefor. It owned them.

The only problems worth discussing are the facts that petitioner was not released from its obligation to the wet gas producers and that petitioner continued to maintain its gathering lines and meters and to pay the royalties to the wet gas producers. (Petitioner in its opening brief, pages 29 and 30, has answered the respondent's argument that the contract, Exhibit 3, was not assignable by Signal.)

In these matters petitioner was merely acting in its own interest as to approximately 70% and as to the 30%, as an agent for Signal.

Signal agreed to pay petitioner more than enough to enable petitioner to satisfy the underlying royalties to the wet gas producers. Unless the royalties to the wet gas producers were paid, Signal's rights would have been wiped out. Signal took the contracts subject to such royalties, and hence Signal agreed to pay them. Compare *Crane v. Commissioner,* 331 U. S. 1, where a seller who (though not personally liable) held property subject to a mortgage and conveyed to a grantee who took it subject to but did not become personally liable for the mortgage.

It was held that though the seller's interest under state law may have been characterized only as an "equity of redemption", nevertheless his interest constituted property and the value of his interest was the value of the whole property. The outstanding mortgage, subject to which the buyer took title was held to be property "other than money" and was therefore part of his cost and of the seller's proceeds of the sale. The payments to the mortgagee were paid by the grantee but the result would not have been different had the grantee paid the amounts to the grantor who had then paid them to the mortgagee.

Applying the principle of the *Crane* case to the instant case, petitioner sold 100% of the contracts and not merely 57½¢ thereof even though petitioner remained liable for the gas producers' 42½% royalties, since Signal took the contracts subject to the liability for such royalties.

As to the gas gathering lines and the reading of the meters, it is frequently the case that a seller of property, merely for convenience, will remain liable to perform some function, to remain on the mortgage, etc.

The patent cases cited in pages 26 to 29, inclusive, of petitioner's original brief, are cogent authority for the proposition that the wet gas contracts, or an interest therein, were sold.

Petitioner sold the contracts or an interest in the contracts and is entitled to long term capital gain treatment thereon.

On pages 39 and 40 of his brief, respondent suggests that petitioner cannot contend in this court that a 30% interest in the contracts, instead of a 100% interest, was sold. He cites *Hormel v. Helvering,* 312 U. S. 552, for the principle that an appellant may not raise issues in the

appellate court which he has not argued in the court below. But the Supreme Court, in that case (p. 556) gave as the reason, "This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence."

The Supreme Court, in the *Hormel* case, recognized, (p. 557) that exceptions to the rule were made so as not to do "violence to the statutes which give the Circuit Court of Appeals reviewing decisions of the Board of Tax Appeals the power to modify, reverse or remand decisions not in accordance with law 'as justice may require' ".

In the case at bar, the evidence on the question of a sale of 30% interest in the contracts is the same as it would be on the sale of a 100% interest in the contracts. There is no contention that the respondent could introduce any more documents or evidence if there were a remanding of the case. Hence, the respondent can hardly claim, and has not claimed, that he is surprised to his detriment, by the claim that an interest in, instead of the whole of, the contracts, was sold.

In 3 Am. Jur, page 35, it is stated that questions necessarily involve in litigated issues are open for consideration on appeal, even though they were not specifically raised below. It particularly refers (p. 37) to cases where "a newly advanced theory involves only a question of law arising upon the proved or admitted facts".

The cases cited in support of these exceptions are: *Arrington v. United Royalty Co.*, 188 Ark. 270, 65 S. W. 2d 36, 37, 90 A. L. R. 765; *Wadsworth v. Union Pac. R.*

Co., 18 Colo. 600, 33 Pac. 515, 519; *J. I. Case Threshing Mach. Co. v. Huber,* 160 Mich. 92, 125 N. W. 66, 69; *Booth v. Hairston,* 193 N. C. 278, 136 S. E. 879, 881.

It is axiomatic that the "whole includes all its parts", and that an issue of the sale of a 100% interest in a contract includes the issue of sale of a 30% interest in the same contract.

Conclusion.

The Tax Court erred in holding that the form of the contract differed from its substance because of petitioner's alleged motive to save tax on the $85,000.

The only issue is whether the contracts or an interest therein were sold.

The retention by petitioner of minor or nominal obligations for the obvious convenience of all parties concerned and without any tax motive does not prevent the transaction from being a sale.

The decision of the Tax Court should be reversed, since the petitioner realized long term capital gain on the sale of the contracts.

Respectfully submitted,

MELVIN D. WILSON,

MELVIN H. WILSON,

Attorneys for Petitioner.

No. 16204

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

PAINT, VARNISH & LACQUER MAKERS UNION, LOCAL 1232, AFL-CIO, AND STEEL, PAPERHOUSE, CHEMICAL DRIVERS & HELPERS, LOCAL 578, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,

Respondents.

REPLY BRIEF FOR RESPONDENTS.

STEVENSON, HACKLER & ANSELL,
By CHARLES K. HACKLER,
1616 West Ninth Street,
Los Angeles 15, California,
Attorneys for Respondents.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171

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No. 16204

IN THE

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NATIONAL LABOR RELATIONS BOARD,

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Respondents.

REPLY BRIEF FOR RESPONDENTS.

Statement of the Case.

Andrew Brown Company is a California corporation which operates a plant in Los Angeles, California, where it is engaged in the manufacturing, sale and distribution of paint and allied products. Said firm will be herein referred to as the "Company". The Paint, Varnish & Lacquer Makers Union, Local 1232 and Steel, Paperhouse, Chemical Drivers and Helpers, Local 578 are labor organizations and will be herein referred to as "Unions".

The Unions commenced picketing of the Company on *July 29, 1955.* [Tr. p. 19.] The pickets carry placards addressed to the public stating that the Employer's pro-

ducts were nonunion and were on the "We do not patronize" list of the two Unions. The signs bore the names of both Unions. The picket signs and oral appeals of the pickets were directed to the public and to employees of suppliers or customers of the Employer rather than to the Employer's employees. There was some evidence that on *July 29 and August 1, 1955,* the Union had requested recognition of the Company. [Tr. p. 20.]

On *November 16, 1955,* the Company filed a representation petition in Case No. 21-RM-379. On the *same day* the Unions by letter disclaimed any interest in representing the Company's employees. [Tr. p. 49; Resp. Ex. 5, 6.] The Company received Exhibit "5" on November 18, 1955, made photostats of it and sent it to other competitors in the industry. [Tr. p. 91.] The Company's salesmen were given photostatic copies of Exhibit "5" and used them in connection with meetings with customers. [Tr. p. 92.] The original of Exhibit "5" was photographed and blown up into a big fair sized poster, of the approximate size of 2½′ wide and 5′ high, and was posted at conspicuous places in the plant where employees could see it. [Tr. pp. 93, 94.] Exhibit "6" was also received by the Company in the due course of mail. [Tr. pp. 94, 95.]

The representation hearing was held on January 6, 1956 and ultimately the Board found that "the current picketing is not solely for the purpose of organizing the employees, but is tantamount to a present demand for recognition of both Unions by the Employer without regard to their majority status." *115 N.L.R.B. No. 132* (Mar. 21, 1956). The wide publicizing of the disclaimer letters, Exhibits "5" & "6" to employees, competition and customers alike, was not mentioned in this decision. An election was directed in appropriate units for each of the

Unions. On *April 10, 1956,* the election was held and neither union received a majority of the votes. When the unions continued picketing, complaints were issued alleging that Section 8(b)(1)(A) of the Act had been violated. The placard of the pickets sign reads as follows:

To the Public

The products manufactured by this firm

Andrew Brown Company

"Brolite"

are

Non-Union

This product is on the "We do not patronize list" of Teamsters Joint Council No. 42, Los Angeles District Council of Painters, Los Angeles Building Trades Council, Los Angeles Central Labor Council. [Tr. pp. 22, 23.]

At the hearing in Case No. 21-CB-830, no testimony was offered. The Unions stipulated that picketing was being carried on and that they did not represent a majority of the employees. On the question of the objective of the picketing, the trial examiner, over the Unions' objection, took official notice of the Board's finding in the prior representation hearing (115 N.L.R.B. No. 132) that the Unions were demanding recognition from the Company despite their lack of majority status. [Tr. pp. 26, 27.] It is noteworthy that the Trial Examiners *did not* take official notice of the underlying evidence in the representation case which gave rise to the finding of fact. The Trial Examiner in his intermediate report found a Section 8(b)(1)(A) violation and this was affirmed by the Board.

I.

The Conduct of the Unions Is Not Violative of the Act.

As stated by the General Counsel, this case presents a question of statutory interpretation which was left open by this Court in *N.L.R.B. v. I.A.M. Lodge 942,* decided February 4, 1959, No. 15, 814 viz, whether Section 8(b)(1)(A) of the Act prohibits picketing to compel an employer to recognize a minority union. A full statement of the reasons supporting the Unions position is contained in the Machinists answering brief in No. 15, 814 to which this Court is respectfully referred.

This Court's attention is also respectfully directed to the District of Columbia's decision in *Drivers Local 639 v. N.L.R.B.,* 43 L.R.R.M. 2156 wherein similar conduct was held not violative of the Act. On *April 20, 1959,* the United States Supreme Court granted certiorari in this decision.

II.

The Taking of Official Notice of the Board's Findings of Fact and Conclusions of Law in 115 N.L.R.B. No. 132 Was Error and Deprived the Unions of Due Process.

It is clear that aside from the basic question which is presently before the United States Supreme Court, the General Counsel's case falls for want of proof of an unlawful objective if the Trial Examiner was without legal authority to make a fact finding of a recognitional objective *solely* upon the basis of the Board's finding contained in the representation case decision. It is equally clear that the Trial Examiner took official notice *only* of the ultimate finding of fact to-wit: that the Unions picketing had as its objective the acquiring of recognition

rights. Conversely, the Trial Examiner did not take notice of the *evidence* upon which the findings were based. The examiner made it clear that he considered the ultimate finding in the RM case as substantial evidence in and of itself to support a determination of unlawful objective.

In his Intermediate Report he adhered to these rulings and explains that he had accepted the representation case decision "as prima facie evidence of the facts found therein, as contended by the General Counsel, that he may proceed to take official notice of such fact, and that the decision *constitutes substantial evidence in this proceeding of the facts therein found.*" [Tr. p. 26.]

Objection was made at the hearing that Respondents had no way of controverting by evidence the *fact finding* and *conclusions* of *the Board itself, as distinct from the evidence received by the Board upon which such findings were based.* How, for example, could the Trial Examiner weigh oral testimony of witnesses against a finding made by an administrative body, least of all, of an administrative body which in this very proceeding would act as the reviewer of the Trial Examiner's "resolution" of difference between testimony heard by him and a prior decision of his agency? How, indeed, could the Board itself weigh Respondents' testimony against a bare prior determination of its own in the absence *of the evidence* upon which such prior findings rested. Accordingly, the suggestion that the Board's decision was received as subject to rebuttal evidence was and is completely illusory. In truth and in fact, the prior findings and conclusion of the Board in the RM case were treated as *res judicata* upon the Respondents with respect to the *only controverted fact issue in the case.*

The Trial Examiner must have been troubled by this aspect of his ruling because in his Intermediate Report he stated:

> "More particularly, Respondents are specifically protected under §9(d) of the Act which provides that wherever any Board finding of unfair labor practices and ensuing order 'is based in whole or in part upon facts certified following an investigation pursuant to sub-section (c) of this section and there is a petition for the enforcement or review of such order, *such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under §10(e) or 10(f),* and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.'" (Emphasis added.) [Tr. p. 28.]

This amazing rationale overlooks two fundamental considerations underlying section 9(d):

> (1) *"Facts certified* following an investigation" mean the Board's certification that a union does or does not represent a majority in an appropriate bargaining unit. These "certified facts" are not by any means the various specific fact findings which appear in a Board's decision. In deed, the true certified facts may result from a consent election agreement quite as appropriately as from a hearing.
>
> (2) More importantly, the Respondents defending an unfair labor practice complaint, are not "protected" in any respect by being permitted to see the transcript of the representation case evidence only if they carry the case to the United States Court of Appeals.

> Presumably, the Board itself is not to be permitted in this proceeding to examine the evidentiary basis, if any, upon which the ultimate fact findings, contained in its prior decision, were based. The record below is clear that Counsel for the General Counsel offered and the Trial Examiner received only the bare RM case decision itself and the formal certification documents which followed it.

The unfairness of such a procedure becomes even more patent when it is recalled that representation proceedings are specifically excepted from the protection of a trial, evidence, findings, appellate procedure and expert adjudication as provided in the Administrative Procedure Act with respect to administrative proceedings which have for their purpose the imposition of sanctions upon respondents. The rules of evidence of the Federal District Courts are not applicable to the representation proceedings as they are to the unfair labor practice proceedings. In successfully resisting direct court review of representation proceedings, the Board has constantly taken the position, and secured court approval thereof, that representation proceedings are non-adversary activities of a peculiar investigational character.

Madden v. Brotherhood of Transit Employees, 147 F. 2d 439;

N.L.R.B. v. Falk Corp., 308 U. S. 453;

A.F.L. v. N.L.R.B., 308 U. S. 401;

Fitzgerald v. Douds, 167 F. 2d 714

None of the cases cited by the Trial Examiners involved the use of a representation case decision, alone, as proof of an essential element of an unfair labor practice. An examination of *N.L.R.B. v. Townsend,* 185 F. 2d 378 (9th Circuit) cert. denied, 341 U. S. 909, relied

upn by both the Counsel for the General Counsel and the trial Examiner, shows that the court did not approve but, in fact, questioned the Board's use of official knowledge of fact findings contained in the prior representation proceedings. The use of this type of evidence was sustained only because the Respondent had failed to preserve his objection thereto under Section 10(e) of the Act. As this court stated:

> ". . . the respondent did not avail himself of a twenty day period . . . to object to receipt in evidence of the prior decision by *the questionable procedure of taking judicial notice thereof or to the finding of basic fact rested thereon.*" (Emphasis added.)

The Intermediate Report demonstrates just how illusory was the right accorded the Unions to offer evidence rebutting the Board's finding. The Intermediate Report erroneously states that Respondents "did not seek to rebut these findings." [Tr. p. 18.] The Unions did offer countervailing evidence. Their difficulty is that the Trial Examiner simply failed to allude to this evidence in his Intermediate Report, underscoring the fact that he, in fact, treated the Board's RM case decision as *res judicata.* (See Unions' Exhibits 1 through 6 inclusive, and the stipulation of facts showing that Unions' Exhibit 5, the Paint Makers disclaimer letter, was, prior to the RM case hearing, enlarged, and widely publicized by the Company to all of its employees, its customers and its salesmen. [Tr. pp. 64-68.] It may be granted that the Trial Examiner or anyone else might have difficulty in assessing the weight of the Unions' evidence against the bare findings of the Board, but their relevance seems obvious. In its RM case decision, the Board appears to say that the

disclaimer letter should not be taken at face value because the union continued its picketing. The language of the Board is quite obscure on this point. In one place the Board says the picketing is *"tantamount* to a present demand for recognition"; in another place the Board says with respect to the disclaimer letters that they are "ineffectual to remove the question concerning representation herein." In this setting, who can say whether the Board would have reached the same conclusion had it known that the Company had posted enlarged copies of the disclaimer letter in locations throughout the plant for employees to read, and had widely circulated the letter through its salesmen to its customers. We have not been given the benefit of the transcript of the Board proceeding but it seems rather doubtful that the Company officials would have testified as to this conduct since it was at complete variance with the position taken by the company in the representation proceeding, viz., that the unions' disclaimer letter did not mean what it said. If it be assumed that the Board regarded the picketing as a contradiction of the disclaimer letter, this contradiction would seem to disappear when it is learned that the Company, its employees, and its customers all regarded the letter as a true statement of the Unions' position even while it continued its picketing. It may be noted at this point that such publicizing conduct on the part of the Company completely negatives any coercion or restraint of employees, arising from so-called recognitional picketing. How can employees believe that their Section 7 right to refrain from union activity is sought to be abridged by a union which their employer assures them is not even seeking to act as their exclusive bargaining representative? Specific exception was made to the failure of the Trial Examiner to make any finding whatsoever upon this im-

portant conduct of the Company and its obvious effect upon the minds of the employees. Not only does this evidence negative any violation of Section 8(b)(1)(A) but it is the strongest kind of countervailing evidence in rebuttal of the Board's RM case decision, which goes to the very heart of the question as to whether the picketing, after dispatch of the letter, had, for its purpose, even in part, the aim of exclusive recognition.

Viewed in another light, the posting and publicizing to employees of the disclaimer letter must be regarded as more effectual than the posting of a board notice under Section 8(b)(1) as recommended by the Trial Examiner and the Board. After all, if employees are informed in a letter bearing the signature of a union official and on the union stationery, that the union does not seek to act as their exclusive bargaining representative, and if such letter bears the implied approval of the employer, what purpose is served by the holding of a Labor Board election. There is no question of the power of the Labor Board to order an election if it so desires, and the union has no way of appealing from such action of the Board, in forcing it into an unwanted and premature election. But it is quite another thing for such a proceeding to be used as irrebuttable proof of an unfair labor practice. The election papers received into evidence indicate that neither union had any observers at the election nor did they otherwise participate in it, consistent with their position that they were being forced into a premature election. [G. C. Exs. 5-8.] It is also noteworthy that the Paint Makers Union, whose letter had been posted by the Company, received only eleven votes in the election, whereas the Teamsters Union lost the election through a tie vote. [G. C. Exs. 7-8.] It will be recalled that the Company saw fit to post only the Paint Makers disclaimer letter

despite the fact that the Board, in effect, managed to impute a recognition request to the Teamsters Local only because its representative accompanied a Paint Maker representative on the occasion when the latter allegedly asked for recognition. Had the Company posted the Teamsters disclaimer letter, it, no doubt, would have received only a minimal vote in its favor in the election.

All of the foregoing shows to what limits the General Counsel is going in this proceeding to try to prevent peaceable organizational picketing. No facts such as these appear in the *Drivers Local 639 v. N.L.R.B.* (*supra*) which was relied upon heavily by the Board prior to its reversal in the DC Circuit. Furthermore, these facts point up the strange shyness of Counsel for the General Counsel when he was asked on the record to explain what relationship the representation election had to his theory of a violation of Section 8(b)(1). He declined to state why it was necessary to allege that an election had been lost after Respondents had stipulated that neither of them had ever represented a majority of the employees. On his theory of the case, the holding of an election should be of no consequence so long as it is established that the Unions never did represent a majority. It seems to the undersigned that the representation proceeding was injected in this case simply and solely for the purpose of attempting to avoid the effect of the disclaimer letters, and in an effort to give some colorable basis for a claim that organizational picketing was in effect recognitional picketing. This case lays bare the strategy being followed by employers with the aid of the General Counsel of the Board to attempt to prevent all organizational picketing as a violation of the Act. The strategy runs as follows:

(1) A union engages in non-recognitional peaceable picketing;

(2) The employer files an RM petition;

(3) The union, to protect itself from a premature election, sends a disclaimer letter to the employer;

(4) A representation hearing is held at which the employer testifies that expressly or impliedly some union official asked him for some kind of recognition;

(5) The Board, under its present policies, directs an election, primarily because the union is still picketing. In so doing, it does not feel called upon to find an express continuing demand for recognition, but only to find equivocal conduct on the part of the union;

(6) The union loses the election, which everyone realized from the beginning the union did not want or seek;

(7) If it continues to picket, the employer files a charge to protect his employees' rights to refrain from unionization;

(8) A "CB" case hearing is held at which it is impossible for the union to make any defense because, upon the employer's and the General Counsel's theory, all of the relative fact issues have already been determined in the representation proceeding. The union is given the illusory right to complain that no election should have been held and to offer evidence of some unspecified kind to show that it had effectively retracted any claim for recognition that it might have made;

(9) The evidence of the union is received but it cannot be credited because the Trial Examiner cannot contradict the implied finding contained in the Board's representation case decision, even though an alleged recognition demand might have occurred many months or years prior to the disclaimer letter and the Board representation hearing;

(10) By the above process, any union which at any time has expressly or impliedly been charged by an em-

ployer with making a pre-election demand for recognition is not at liberty to engage in any organizational picketing. Its disclaimer will be treated as a subterfuge. Its affirmative desire for no election will be disregarded. It will be forced into a premature election and then found guilty of unfair labor practices on the basis of the representation proceeding itself. In this entire process no employee has been coerced or restrained in any respect. As in the present case, the employees may be entirely unaware of all of this high strategy conduct of the employer designed to remove pickets from his plant in his own self-interest, by masquerading as the protector of their right not to join a union even though the union has done nothing that in fact has interfered in the least degree with the exercise of that right.

This elaborate venture designed to protect employers and weaken unions in the exercise of traditional rights heretofore deemed either protected, or at the very least permissible, is further buttressed by the most elaborate re-examination and re-interpretation of the legislative history of the Act and the re-canvassing of a large number of prior Board decisions—all because it is necessary, if the venture is to succeed, to convince the Board that some colorable legal basis can be found, without amendment of the Act, to stop simple organizational picketing. Aside from all of the legalisms which may be brought to bear on the subject, it must strike the Board as strange that these hidden possibilities for the extension of Section 8(b)(1)(A) into an "unlawful purpose" section, have just come to light.

In this vein, it might be well for this Court to consider the policing by it of the 8(b)(1)(A) orders granted by the Board in this case. If this Court should affirm the Board order, and the union complied with this order by

posting the notice for 60 days both in its office and at the Company plant, the question will then arise as to whether the union has the right to engage in organizational but non-recognitional picketing after the posting period has elapsed. The General Counsel contends that such minority picketing is only unlawful to the extent that it is engaged in for the purpose of compelling recognition. However, the unions' disclaimer letters are terated as ineffective to convert recognitional picketing to non-recognitional picketing.

Query: Will the General Counsel take the same attitude with respect to non-recognitional picketing after the posting period following a Board order? We surmise that he will for the simple and obvious reason that the employer's charge in cases of this kind is designed to get rid of the pickets and is in no sense a genuine desire on his part to protect statutory rights of his employees. This being so, he must, and he will, insist that organizational picketing, *per se,* must be stopped for all time at his plant after an 8(b)(1)(A) order.

We know that employers who have been found guilty of violating Section 8(a)(1) have not lost their right to oppose unionization of their employees by *lawful* means, such as addressing protected remarks to captive audiences, "prophesying" rather than "threatening" a plant shutdown if the union should be successful in its drive, and a score of other strategems calculated to prevent unionization but not technically violative of the Act. In fact, they enjoy all of these rights even while their initial unfair labor practice remains unremedied. Should this Court find that recognitional picketing by a minority union coerces and restrains employees within the meaning of Section 8(b)(1)(A), is it prepared to rule that the unions may thereafter engage in lawful non-recognitional picket-

ing designed to obtain majority support? The rationale urged by the Counsel goes a long way in the direction of saying that once a union has made the mistake of asking for recognition, and backed this demand up with picketing, its right to engage in organizational picketing is thereafter gone. Thereafter, any picketing by such a union will apparently be regarded as tainted with the original sin, which we suggest this Court consider before it arrives at any decision on the pending cases posing the 8(b)(1)(A) coverage in cases such as this one. We believe that if this Court will take a long look at the procedures and strategies being followed in cases of this kind, that it will not lend its weight to the employer's attempt to use the Board to prevent organizational picketing. If such picketing, as a matter of public policy, should be curtailed, regulated or stopped, the subject is one for Congress and not for the Board or the judiciary.

III.

The Six-Months Statute of Limitation Bars the Present Case.

The cut-off date under the six months statute of limitation for the Teamsters charge is April 11, 1956, and under the Paint Makers charge is March 3, 1956. The unions did nothing shown in the record during the respective six months periods except to conduct picketing. No demand for recognition was shown in the evidence later than August 1, 1955,—and this demand was only evidenced by the Board's RM case finding, that demands were made on the latter date. This was eight to nine months before the cut-off date under the charge. The disclaimer letters were written in November, 1955, four or five months prior to the cut-off dates. The Board representation hearings were held three to four months

before the cut-off dates. The Board decision was handed down, and the election held, after the Paint Maker cut-off date but prior to the Teamsters cut-off date. It can scarcely be urged the Board's decision and the election and the certification of the results thereof have any bearing upon the unfair labor practices charged. The complaint says that the unions have been continuously picketing for recognition at all times since July 29, 1955, and that neither union has represented a majority at any time since that date. From the foregoing it appears that if any violation occurred, it was complete upon July 29, 1955, more than a year before any charges were filed. There is no reason to consider such a violation, as charged, any more "continuing violation" for statute of limitation purposes, than there is to consider the existence and functioning of a Company dominated union to be a continuing violation after the last act of domination on the part of the Company. Like the picketing, the Company union persists and functions and, presumably, has not lost its Company dominated character any more or any less than illegal purpose picketing has lost its original character. The Board has held that it will not entertain a charge of Company unionism based upon evidence of actual acts of domination or assistance occurring more than six months before the filing of the charge. This is true even though the Company union continues to represent employees and give effect to union shop contracts.

Bricklayers A.F.L. & Selby Battersby & Co., 117 N.L.R.B. No. 51;

Universal Oil Products Company & Oil Workers International Union, 108 N.L.R.B. No. 19;

American Radio Association, 117 N.L.R.B. No. 151;

Superior Engraving Co. v. N.L.R.B., 183 F. 2d 783, and cases cited therein.

It may be true that events beyond the six months period may be used to "shed light" on events occurring within the six months period, as noted by the Trial Examiner, but there still must be evidence of overt conduct of an illegal character within the six months period. It is inaccurate to speak of the pre-six month conduct as "background" or as showing the "purpose and character" of conduct. The only overt evidence of any recognitional demand arises from conduct prior to the six month period. This is an *essential critical* part of the Board's case, *i.e.,* the *sole* proof of unlawful objective and is therefore barred by the statute of limitation. If the rule were otherwise, then the six months statutory period would be meaningless.

It is submitted that the Board having failed to establish by substantial evidence on the entire record that Respondents engaged in conduct having an objective violative of Section 8(b)(1)(A) or any other section of the Act, the order of the Board's petition for enforcement should be dismissed.

Respectfully submitted,

STEVENSON, HACKLER & ANSELL,

By CHARLES K. HACKLER,

Attorneys for Respondents.

No. 16206

IN THE

United States Court of Appeals

For the Ninth Circuit

BLUE MOUNTAIN CONSTRUCTION COMPANY, a Corporation,
Appellant,
vs.
H. C. WERNER and TAUF CHARNESKI,
Appellees.

No. 16206

Appeal from the United States District Court for the District of Oregon

HON. GUS J. SOLOMON, *Judge*

APPELLANT'S BRIEF

JEROME WILLIAMS
CASHATT & WILLIAMS
Attorneys for Appellant
1121 Paulsen Building
Spokane, Washington

NATIONAL PRINTING CO. 73835

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APPELLANT'S BRIEF

JEROME WILLIAMS
CASHATT & WILLIAMS
Attorneys for Appellant
1121 Paulsen Building
Spokane, Washington

NATIONAL PRINTING CO 73839

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STATEMENT AS TO JURISDICTION

This action was commenced in the Federal Court for the District of Oregon as a diversity case. Diversity jurisdiction existed under Title 28 U.S.C. §1332 because, as alleged in the complaint, the plaintiff is a corporate citizen of the State of Washington, and the defendants H. C. Werner and Tauf Charneski are citizens and residents of the State of Oregon and the City of Eugene therein (Tr. 3).

The amount in controversy, as alleged in the complaint, was $140,989.40 (Tr. 9-10).

A judgment of dismissal of the action with prejudice was entered in the Oregon District Court on August 4, 1958 (Tr. 23). On August 27, 1958 plaintiff/appellant filed a notice of appeal with the District Court of Oregon, the notice being in the manner and within the time provided by Rule 73 of the Federal Rules of Civil Procedure (Tr. 26). On the same day appellant filed the required appeal bond (Tr. 27). The record was docketed in this Court on October 3, 1958 (Tr. 45).

On the foregoing facts, this Court has jurisdiction of this appeal by virtue of Title 28 U. S. Code, §1291, and Rule 73 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

This appeal involves the single question of whether the district judge abused his discretion in denying plaintiff/appellant's motion for a dismissal of this

action *without* prejudice pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure.

This action was commenced by appellant on April 4, 1958 by filing a complaint with the Clerk of the Oregon District Court (Tr. 42). In the complaint appellant sought damages for breaches of three subcontracts under which appellant was to perform certain phases of three prime contracts which defendants/appellees had with the United States government for contruction of irrigation works near Moses Lake, in the Eastern Judicial District of Washington (Tr. 3-10). Coincident with the filing of the complaint, the Clerk placed the matter on the call calendar for May 19, 1958. Service of summons was had on the defendants about April 9, 1958 (Tr. 42).

On April 28, 1958, without any intervening proceedings of any kind, the defendants served and filed an answer (Tr. 42). This answer contained no counter-claim and sought no affirmative relief (Tr. 10-13).

Nothing whatsoever occurred thereafter until the call date, May 19, 1958, at which time counsel for both parties appeared before the Honorable Gus J. Solomon, one of the judges of the Oregon District Court, in accordance with customary practice in that court. At that time, only forty-four days after the action had been commenced, plaintiff/appellant, through one of its attorneys, Lester W. Humphreys, of Portland, Oregon, orally moved the court for a dismissal without prejudice (Tr. 29-31). The attorney for appellees objected, stating as the basis for

the objection that, "We have undertaken at considerable expense to go through this thing and prepare ourselves for our answer and also to prepare ourselves for trial." (Tr. 31). Judge Solomon thereupon said, "The right to be sued in your own community is a valuable right. The motion is denied. The case will be tried in Oregon." (Tr. 31).

Thereupon, on May 23, 1958 plaintiff/appellant, through its primary attorney, Jerome Williams of Spokane, filed a "Motion for Reconsideration of and Renewing Plaintiff's Motion for a Voluntary Dismissal Without Prejudice Pursuant to Rule 41(a)(2)" (Tr. 14-17), This motion was supported by an affidavit setting forth in detail the reasons why the dismissal without prejudice was desired (Tr. 15-17). As the affidavit discloses, appellant desired a dismissal in view of an intention to proceed in the Eastern District of Washington against the defendants and their sureties under the Miller Act (40 U.S.C.A. 270 (a)& (b). The renewed motion for a voluntary dismissal without prejudice was set down for hearing on June 16, 1958 before Judge Solomon. At that hearing no further reasons were advanced by the defendants in opposition to the motion for dismissal (Tr. 32-38). Appellant's counsel, on the other hand, elaborated on the reasons why the dismissal without prejudice was sought, pointing out that it was felt that appellant had a right of action on the payment bond under the Miller Act, which statutory action would afford appellant access to the financial responsibility of the sureties. Appellant further pointed out that an action under the Miller Act could only be brought in

the Federal District Court for the Eastern District of Washington, since the work was performed there, and the Miller Act provides that an action on the payment bond can only be brought in the district where the work was to be performed (Tr. 33-34).

At the hearing of June 16, 1958 Judge Solomon first indicated that the motion to dismiss would be granted, "provided you give defendants assurances in a form satisfactory to them, and if they cannot be satisfied, then you will have to satisfy me, that no such actions as were brought here will be brought against them in the State of Washington." (Tr. 36). Appellant's counsel thereupon endeavored to obtain some clarification from Judge Solomon as to just what he had in mind in this respect, and some further colloquy occurred which terminated in a statement by Judge Solomon that appellant's motion for a dismissal without prejudice would be denied (Tr. 38). The only reason expressed by Judge Solomon for the denial was that, "You have hedged on me. You cannot do that in this court" (Tr. 38).

It should be noted that, in the affidavit in support of the renewed motion for a dismissal without prejudice, it was stated "that affiant is prepared to personally meet such terms as the Court may feel are proper" (Tr. 17). Also, on the June 16th hearing, appellant's counsel stated to the court that "I am personally prepared to meet any damages which your Honor feels are warranted in the situation" (Tr. 34).

Upon denying appellant's motion for the second time, Judge Solomon set the case for pre-trial con-

ference on July 21, 1958 (Tr. 38). Appellant thereupon filed a motion in this court for leave to file a petition for writ of mandamus against Judge Solomon, but said motion was denied by this Court on July 16, 1958 (see Cause No. 16071 of this Court). Immediately upon being advised of the denial, appellant, on July 7, 1958, served and filed in the instant case a notice of its election to stand upon its position that it was entitled to a dismissal without prejudice and of appellant's intention to not proceed further with the action (Tr. 18-19). Thereupon an order was entered by Judge Solomon on August 4, 1958, on appellees' motion, dismissing the action with prejudice (Tr. 23-26). This appeal has been taken from that judgment of dismissal with prejudice.

To further assist the Court, we are summarizing the entire proceedings in this case by the following time table:

April 4, 1958	Action commenced by filing complaint in the Oregon District Court.
April 9, 1958	Defendants served with summons.
April 25, 1958	Defendants served and filed an answer containing no counterclaim and asking no affirmative relief.
May 19, 1958	Call date as established by the Clerk of the District Court when the complaint was filed. On appearance at the call calendar plaintiff/appellant moved for a voluntary dismissal without prejudice. The motion was denied by Judge Solomon.

May 23, 1958	Appellant filed a "Motion for Reconsideration of and Renewing Plaintiff's Motion for a Voluntary Dismissal Without Prejudice Pursuant to Rule 41(a)(2)." Clerk placed this motion on calendar for June 16, 1958.
June 16, 1958	Appellant's renewed motion for a dismissal without prejudice was denied by Judge Solomon. Matter placed on calendar for pre-trial conference on July 21, 1958.
July 3, 1958	Appellant filed with this Court motion for leave to file petition for writ of mandamus against Judge Solomon.
July 16, 1958	Motion for leave to file petition for writ of mandamus was denied by this Court.
July 17, 1958	Appellant gave notice that it would stand upon its motion for a voluntary dismissal without prejudice and that it would proceed no further in this case before the District Court.
Aug. 4, 1958	Action dismissed *with* prejudice upon appellees' motion.

SPECIFICATIONS OF ERROR

1. The District Court Erred in Denying Appellant's Motion and Renewed Motion for a Voluntary Dismissal Without Prejudice pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure.

ARGUMENT

Rule 41(a) of the Federal Rules of Civil Procedure provides as follows:

"DISMISSAL OF ACTIONS

"(a) Voluntary Dismissal: Effect Thereof

"(1) *By plaintiff; by Stipulation.* Subject to the provisions of Rule 23(c), and Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

"(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice."

It is well settled that a district judge can abuse

the discretion vested in him under Rule 41(a)(2), and that the question of whether there has been such an abuse of discretion is reviewable by this Court.

International Shoe Co. v. Cool (8th C.A.), 154 Fed. (2d) 778;

Railroad Co. v. Vardaman (8th C.A.), 181 Fed. (2d) 769;

Westinghouse Elec. Corp. v. Electrical Workers (3rd C.A.), 194 Fed. (2d) 770;

Home Owner's Loan Corp. v. Huffman (8th C.A.), 134 Fed. (2d) 314.

Also, there is ample precedent for the procedure followed by appellant, of standing on its motion for voluntary dismissal and declining to proceed further.

Grivas v. Parmalee Transp. Co. (7th C.A.), 207 Fed. (2d) 334;

U. S. v. Proctor & Gamble Co., 356 U.S. 677, 2 L.ed. (2d) 1077;

U. S. v. Wallace & Tiernan Co., 336 U.S. 793, 93 L.ed. 1042;

Wecker v. Nat'l Enameling Co., 204 U.S. 176, 51 L.ed. 430;

Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 66 L.ed. 144;

Ruff v. Gay (5th C.A.), 67 Fed. (2d) 684.

While we recognize that the grant or denial of a motion for dismissal without prejudice pursuant to Rule 41(a)(2), where an answer has been served, lies within the discretion of the district judge, and that there is no unqualified right to such a dismissal after answer, we do contend that the circumstances here were such that a court, in the true exercise of judicial discretion, could only arrive at one result—the granting of the motion.

It is apparent that there are countless possible situations which can face a district judge under Rule 41(a)(2) and there necessarily must be certain extreme situations where the circumstances so plainly demand a ruling either granting or denying a dismissal motion, that an opposite ruling can only amount to an abuse of discretion. On the one extreme is a case such as this, where utterly no other proceedings have taken place, aside from the early service of a brief answer in the form of a general denial, without any affirmative relief being sought and without any motions, discovery procedures or other proceedings having been initiated. On the other extreme would be the case in which extensive pretrial and discovery procedures had taken place, and where the case had actually gone to trial, and the plaintiff's case had been presented. In the latter type of case, a district court might well abuse its discretion in *granting* a dismissal without prejudice, and the Court of Appeals for the Eighth Circuit, in *International Shoe Co. v. Cool,* 154 Fed. (2d) 778, so found an abuse of discretion under such circumstances. So also in the case at bar, we say that, with the very minimum situation presented here, the district judge abused his discretion in denying the motion, although we can find no case precisely in point.

The Supreme Court of the United States has strongly indicated the underlying principles which should control a district judge in considering such a motion in the case of *Cone v. West Virginia Pulp & Paper Co.,* 330 U. S. 212, 91 L.ed. 849 (1946). There the court said:

"Take the case where a trial court is about to direct a verdict because of failure of proof in a certain aspect of the case. At that time a litigant might know or have reason to believe that he could fill the crucial gap in the evidence. Traditionally, a plaintiff in such a dilemma has an unqualified right, upon payment of costs, to take a non-suit in order to file a new action after further preparation, unless the defendant would suffer some plain legal prejudice other than the mere prospect of a second law suit. (Citing cases.) Rule 41(a)(1) preserves this unqualified right of the plaintiff to a dismissal without prejudice prior to the filing of defendant's answer. And after the filing of an answer, Rule 41(a)(2) still permits a trial court to grant a dismissal without prejudice 'upon such terms and conditions as the court deems proper.'"

See also:

Railroad Co. v. Vardaman (8th C.A.), 181 Fed. (2d) 769;

Home Owners Loan Corp. v. Huffman (8th C.A.), 134 Fed. (2d) 314;

Westinghouse Elec. Corp. v. Electrical Workers (3rd C.A.), 194 Fed. (2d) 770;

Welter v. Dupont Co. (D.C. Minn.), 1 F.R.D. 551.

Barron & Holtzoff on Federal Practice and Procedure, Vol. 2 at §912 of the Pocket Part, says:

"In exercising its discretion the court follows the traditional principle that dismissal should be allowed unless the defendant will suffer some plain legal prejudice other than the mere prospect of a second law suit."

No "plain legal prejudice other than the mere prospect of a second law suit" was shown to the court by the appellees in opposition to this motion. On the

contrary, appellant's motion for reconsideration, with its supporting affidavit, set forth to the court compelling reasons why, in the interests of justice, the motion should be granted, subject to such terms as the court might deem proper (Tr. 15-17). It was pointed out in the affidavit, and orally upon the hearing of the motion for reconsideration (Tr. 33-34), that the appellant had determined to its satisfaction that it had grounds for prosecuting an action under the Miller Act, based upon a claim that the subcontract between appellant and the appellees had been modified so as to entitle appellant to a quantum meruit recovery upon the payment bond for the work and labor performed for the appellees, notwithstanding the contract price, under the authority of cases such as the decision of this Court in *Continental Casualty Co. v. Schaefer,* 173 Fed. (2d) 5.

The complaint in the Oregon action could not be amended so as to bring in the sureties on the payment bond under the Miller Act, because under the specific provisions of that act (40 U.S.C.A. 270 b.) an action on the bond can only be brought in the district "in which the contract was to be performed and executed and not elsewhere," which in this case required the action to be brought in the Eastern District of Washington.

Yet in the face of this utter absence of any showing of prejudice to the appellees, and the showing of compelling reasons why the motion should be granted to afford appellant a clear field to test the valuable rights which it claimed under the Miller Act, and in

the face of a bare minimum situation presented under Rule 41(a)(2), the district judge denied the motion.

As to the reason initially given by the district judge for denying the motion, that "the right to be sued in your own community is a valuable right" (Tr. 31), we submit that that is not a factor proper of consideration in the exercise of the discretion vested in the district court by Rule 41(a)(2). As stated by the Supreme Court in the *Cone* case, supra, the determining factor is ordinarily whether the defendant would suffer some plain legal prejudice other than the mere prospect of a second law suit.

As for the reason expressed by the district judge in denying the motion at the second hearing, that "You have hedged on me. You cannot do that in this court" (Tr. 38), we submit that whether or not an attorney has hedged is not a valid reason for denying justice to the litigant. Furthermore, we are confident that this Court, in reading the record of what occurred, will conclude that there was no "hedging" by appellant's attorney, but only a legitimate effort to determine what the district judge had in mind by the condition he proposed to impose (Tr. 32-38).

If it is to be held that a district judge can deny a motion for a voluntary dismissal without prejudice in the minimum situation here presented, where nothing whatsoever has transpired but the filing of an answer, then Rule 41(a)(2) becomes meaningless, and a district judge can uniformly deny all such motions. That such a result was not intended by the rule mak-

ers seems apparent. The rule obviously contemplates that such motions after answer should ordinarily be granted in those cases where the defendants can be made whole as to any expense or inconvenience by means of the imposition of terms. Here the appellees can be fully restored to their former position by the expedient of terms. On the other hand, the appellees will obtain an unconscionable advantage and the appellant may be in danger of losing valuable rights under the Miller Act by the denial of the motion. In other words, the denial of the motion converts Rule 41(a)(2) into a sword, rather than the simple protective shield it was intended to be. It and the other rules were never intended to be a snare for the unwary, but rather were intended to promote the ends of justice by eliminating the technicalities which often led to unjust results.

Looking at it another way, the rule contemplates situations, after the filing of an answer, where the district judge should grant a dismissal without prejudice, and other situations where he should deny such a motion. There is an inconvenience to any litigant in preparing an answer, but the rule obviously contemplates the granting of dismissals without prejudice despite the inconvenience of preparing an answer. Here, that is the only possible inconvenience which has been suffered by the appellees. The record affirmatively shows that absolutely nothing else has been done by them or their attorneys. In other words, the situation is just barely within the lower boundary of the area covered by Rule 41(a)(2), and just barely beyond the point where appellant could have obtained

a dismissal without prejudice as a matter of absolute right by the filing of a notice under Rule 41(a)(1). As a matter of fact, under Rule 41(a)(1), a plaintiff could have an absolute right to a dismissal without prejudice by simply filing a notice, in situations where vast amounts of discovery procedures have been employed, motions made and other things done, if perchance the defendants had not served an answer.

If a district judge can ever abuse his discretion by the denial of a motion under Rule 41(a)(2), the case at bar must be such a one. No more extreme situation could be conceived. We again refer to the case of *International Shoe Co. v. Cool* (8th C.A.), 154 Fed. (2d) 778, where it was held that there was an abuse of discretion in granting a motion under Rule 41(a)(2), and again say that if there can be an abuse of discretion at that end of the scale, there must of necessity be a similar area for abuse of discretion at the other extreme where this case stands.

As to what constitutes abuse of discretion, this Court has said, in *Bowles v. Quon,* 154 Fed. (2d) 72,

> "An abuse of discretion is a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effects of the facts as are found."

The Court of Appeals for the Eighth Circuit, in *Hartford Co. v. Obear Glass Co.,* 95 Fed. (2d) 414, held that an abuse of discretion meant arbitrary action not justifiable in view of the situation and circumstances.

The Court of Appeals for the Seventh Circuit, in *Ryan v. Chatz,* 125 Fed. (2d) 396, held that an abuse

of discretion existed where discretion was not wisely exercised.

The Supreme Court of the United States, in *Burns v. U. S.,* 287 U. S. 216, 77 L.ed. 266, said:

> "Whether there has been an abuse of discretion is to be determined in accordance with familiar principles governing the exercise of judicial discretion. That exercise implies conscientious judgment, not arbitrary action. It takes account of the law and the particular circumstances of the case and is directed by the reason and conscience of the judge to a just result."

CONCLUSION

We earnestly contend that this Court should find an abuse of discretion and should reverse this case and direct the entry of an order of dismissal *without prejudice,* so that appellant may pursue its claimed Miller Act rights free of any controversy as to whether it is barred by a prior judgment. If this Court agrees, then we suggest that it should fix any terms, or at least indicate the nature and limits of the terms to be imposed.

Respectfully submitted,

JEROME WILLIAMS
CASHATT & WILLIAMS
Attorneys for Appellant
1121 Paulsen Building
Spokane, Washington.

NO. 16206

United States
COURT OF APPEALS
for the Ninth Circuit

BLUE MOUNTAIN CONSTRUCTION COMPANY, a corporation,

Appellant,

v.

H. C. WERNER and TAUF CHARNESKI,

Appellees.

BRIEF OF APPELLEES

Appeal from the United States District Court for the District of Oregon.

HON. GUS J. SOLOMON, Judge.

LEO LEVENSON,
NORMAN B. KOBIN,
Attorneys for Appellees,
314 Portland Trust Building,
Portland 4, Oregon.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE.. 2-59

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BRIEF OF APPELLEES

Appeal from the United States District Court for the District of Oregon.

HON. GUS J. SOLOMON, Judge.

JURISDICTION

This action was commenced in the United States District Court for Oregon, as a diversity case under 28 USCA Sec. 1332 and 28 USCA 1391(a). The plaintiff is a corporation of the State of Washington and defendants are citizens and residents of the State of Oregon residing in the City of Eugene.

The amount in controversy is $140,989.40.

A judgment of dismissal of the action with prejudice was entered on August 5, 1958.

This court acquired jurisdiction under 28 USCA 1291.

STATEMENT OF THE CASE

This appeal involves an action for damages for breach of contracts, and reformation of the contract, under which appellant was to perform certain portions of work which appellees, as prime contractors, had under a contract with the United States government for the construction of an irrigation project near Moses Lake, in the Eastern Judicial District of Washington.

Appellees filed their answer to the complaint. No affirmative relief or counterclaims were sought by appellees.

The action came before the court on the regular call day at which time appellant's counsel moved the court for a dismissal without prejudice and without assigning a reason for its motion to dismiss (Tr. 29-31).

Counsel for appellees opposed the motion. The court directed that the case be tried in Oregon and denied the motion to dismiss.

Thereafter appellant filed a second motion for reconsideration of its motion to dismiss without prejudice, pursuant to Rule 41(a)(2), and, according to the affidavit attached to the motion, it was based upon the premise that appellant desired to file its action on the basis of the Miller Act (40 USCA 270(a)(b). This

affidavit alleged that appellant was under the belief that it was obligatory to bring its action in the United States District Court for the Eastern District of Washington, and not elsewhere. On the reconsideration of the motion the court again denied it and definitely set the case for pretrial conference (Tr. 17-18).

On July 3, 1958 appellants filed a Petition for Writ of Mandamus in the United States Court of Appeals, for the Ninth Circuit, Case No. 16071, against the trial judge, based upon his refusal to allow a voluntary dismissal. The Motion for the Petition for the Writ was denied.

On July 17, 1958 appellant, through its counsel, filed with the United States District Court for Oregon a Notice of Election stating it declined to proceed further with its case (Tr. 19-20).

The action was thereafter set for pretrial conference with notice to appellant to appear, and appellant declined to appear, and upon motion of counsel for appellees (Tr. 23) the court entered an order dismissing the action with prejudice for failure to prosecute with due diligence.

The Specification of Error relates solely to the refusal of the court to allow a voluntary dismissal pursuant to Rule 41(a)(2) of the Rules of Civil Procedure.

SUMMARY OF ARGUMENT

The proper venue of this action was in the District Court for Oregon. It was not an abuse of discretion to deny motion to dismiss because of misapprehension it was obligatory to file action elsewhere.

Miller Act provision that suit be brought in any district in which contract was to be performed and not elsewhere is a restriction on venue rather than on power of court to entertain suit.

ARGUMENT

THE PROPER VENUE OF THIS ACTION WAS IN THE DISTRICT FOR OREGON. IT WAS NOT AN ABUSE OF DISCRETION FOR COURT TO DENY MOTION TO DISMISS BECAUSE APPELLANT WAS UNDER MISAPPREHENSION IT WAS OBLIGATORY TO FILE THE ACTION ELSEWHERE.

There was no abuse of discretion in denying the motion for a voluntary dismissal, after answer was filed, and where the motion was opposed by appellees.

Appellant elected to file its action for damages in the District Court for Oregon where appellees reside, which was the proper venue, and presumably the whole merits of its alleged claim were considered prior to filing.

Upon the initial application for dismissal no cause was assigned in support of the motion. In opposing it, appellees' counsel urged strong and cogent reasons (Tr. 31):

> "Mr. Kobin: We have undertaken at considerable expense to go through this thing and prepare ourselves for our answer and also to prepare our-

selves for trial. And it would be an unreasonable burden, in my opinion, that would be imposed upon the defendants to permit them to come in here without any reason other than they want to dismiss and ask for a dismissal without prejudice, and especially without any conditions attached.

Mr. Humphreys: I don't see that any harm will be done, your Honor.

The Court: The right to be sued in your own community is a valuable right. The motion is denied. The case will be tried in Oregon. I will set it down for pretrial in 30 days, June pretrial."

After denial of the motion, appellant applied for reconsideration, and represented that the filing of the action in the District Court for Oregon (Tr. 34), had been ill considered and since a further study of the facts of the case was made, it was deemed advisable to pursue a remedy under the Miller Act and to join as an additional defendant the surety on appellees' undertaking.

On page 11 of appellant's brief, it is contended:

"The complaint in the Oregon action could not be amended so as to bring in the sureties on the payment bond under the Miller Act, because under the specific provisions of that act (40 U.S.C.A. 270 b.) an action on the bond can only be brought in the district 'in which the contract was to be performed and executed and not elsewhere,' which in this case required the action to be brought in the Eastern District of Washington."

The above reason and objective for dismissal have no basis in law.

Appellant's complaint in this case alleged a cause of action between citizens of different states; it is a

diversity of citizenship action and must be brought in the judicial district where the defendants reside, the principal object under the law is to serve the reasonable convenience of defendants. 28 USCA 1391(a). *Riley v. Union Pac. R. Co.,* 177 F. 2d 673, cert. denied 70 S. Ct. 350, 338 U.S. 911, 94 L. Ed. 561.

A party waives the venue by not objecting. 28 USCA 1406(b). *Riley v. Union Pac. R. Co.,* supra.

MILLER ACT PROVISION THAT SUIT BE BROUGHT IN ANY DISTRICT IN WHICH CONTRACT WAS TO BE PERFORMED AND NOT ELSEWHERE IS A RESTRICTION ON VENUE RATHER THAN ON POWER OF COURT TO ENTERTAIN SUIT.

For a period of time in the past, it was assumed that actions under the Miller Act were required to be instituted in the district court of the district in which the contract is to be performed and not elsewhere, and this was deemed a jurisdictional matter that could not be waived even by consent of the parties. This erroneous assumption had its genesis when the Supreme Court in deciding the case of *United States v. Congress Construction Co.,* 222 U.S. 199, 32 S. Ct. 44, 56 L. Ed. 163, misconceived the distinction between jurisdiction and venue. Since that case was decided the Supreme Court re-examined the question of the power of a court to try a case as distinguished from a venue statute. Cf. *Hoiness v. United States,* 335 U.S. 297, 93 L. Ed. 16; also annotations 93 L. Ed. 21.

A case under the Miller Act may be filed in the judicial district where defendants reside irrespective

of where the contract was to be performed. It is a matter of venue, not jurisdiction. This principle was announced in *Texas Construction Company and U. S. F. & G. Co. v. United States of America for the use of Caldwell Foundry and Machine Company, Inc.,* 236 F. 2d 138 (5th, 1956), where the Court of Appeals, passing upon the question not theretofore decided by any federal court, held that the Miller Act provision that suit can only be brought in the district in which the contract was to be performed and executed and not elsewhere, is a restriction only on venue and not on the power of a court to entertain the suit.

In a well reasoned opinion by Judge Tuttle, Circuit Judge, it was stated:

> ". . . The action was originally filed in the court below relying specifically on the terms of the Miller Act. It also asserted the necessary jurisdictional facts to warrant the bringing of a suit on the grounds of diversity of citizenship, if such a cause of action was pleaded. The principal issue on the original trial was as to the responsibility, and thus legal liability, for certain delays in the performance of the contract sued on. The trial court held in favor of the defendant below, the general contractor, which with its surety, is the appellant here. On appeal to this Court we reversed and remanded to the trial court to enter judgment for the plaintiff, the present appellee.
>
> ". . . This precise question has not been decided by any federal court. The appellants point with confidence to the early case of United States v. Congress Construction Co., 222 U.S. 199, 32 S. Ct. 44, 56 L. Ed. 163, as being determinative of the issue. . . ."
>
> ". . . Thus it is that we find it necessary to

approach cautiously any reliance upon the decision by the Supreme Court in the intervening period which deals with this confused problem. This is all the more so because the Court, in Lee v. Chesapeake & Ohio R. Co., supra, was construing a section of the statute which appears to us to be as positive a limitation on the place where a suit could be brought as is the language in the Heard and Miller Acts. . . ."

". . . Having concluded that the jurisdictional point is not good because *the statute is a restriction only on venue* rather than on the power of the court to entertain the suit, we do not need to pass on the other grounds on which the district court overruled the plea to the jurisdiction. Thus we do not need to decide whether the fact that some work was done on the contract within the Northern District of Texas would satisfy the requirement of the statute, if it were a jurisdictional statute, that suit be brought 'in any district' in which the contract was to be performed; or whether jurisdiction could be retained because the complaint alleged a cause of action between citizens of different states and the suit was thus not solely a Miller Act case; or that jurisdiction was acquired by the Court, even though not previously existing, when the defendant below filed its counterclaim; nor, finally, that the Northern District had jurisdiction under the jurisdictional statute providing for actions on bonds generally. 28 U.S.C.A. § 1352." (Emphasis added.)

By reason of the above authority, we respectfully submit, the premise upon which the motion for dismissal was made, and, as further stated on page 13 of appellant's brief, "the appellees will obtain an unconscionable advantage and the appellant may be in danger of losing valuable rights under the Miller Act by the denial of the motion," are clearly untenable and without support in law.

It would have been substantial error for the trial court to have allowed the motion for dismissal of this action for the objectives sought by appellant, and over the objections of appellees. The venue was properly in the District Court for Oregon, where appellees reside, and, venue not being waived by them, the trial court was obliged to retain jurisdiction and to proceed with the trial. *Riley v. Union Pac. R. Co.,* supra.

The ends of justice have always required that a defendant be sued in the place of his residence, unless he waives the privilege. This right is safeguarded by statute. 28 USCA 1391(a).

Venue is a litigant's personal privilege granted for a purpose; and, generally, venue relates to convenience of parties and affords defendants some protection against being forced to defend an action at a place far removed from his residence. *Jacobson v. Indianapolis Power & Light Co.,* 163 F. Supp. 218.

Appellant, on page 12 of its brief, deems the right of a defendant to be sued in his own community to be of no great consequence; that it is not a proper factor of consideration in determining the question of whether a court should allow a dismissal of the cause.

The right of a defendant to be sued in the place of his residence is an ancient and valuable right, which has always been safeguarded by statute. As stated in *Neirbo v. Bethlehem Shipbuilding Corp.,* 308 U.S. 165, 84 L. Ed. 167, 60 S Ct.. 153:

> "But the locality of a law suit—the place where judicial authority may be exercised—though defined

> by legislation relates to the convenience of litigants and as such is subject to their disposition. This basic difference between the Court's power and the litigants convenience is historic in the federal courts."

Congress, in conferring jurisdiction on the district courts in cases based on diversity of citizenship, has been explicit to confine such suits to "the judicial district where all plaintiffs or defendants reside." 28 USC Sec. 1391(a).

By voluntarily bringing its action in the District Court for Oregon appellant relinquished and waived any right to object to the venue. *Olberding v. Illinois Central R. Co.,* 346 U.S. 388, 74 S. Ct. 83, 98 L. Ed. 39; *Riley v. Union Pac. R. Co.,* supra.

Despite appellant's anomalous contention, that appellees' statutory right to defend the action at the place of their residence "is not a proper factor of consideration," it is in a complete variance with appellant's own primary objective in support of its motion for dismissal. To gain more advantages for its own conveniences and oblivious to the real necessities of appellees, irrespective of the heavy burden that would be placed upon them, appellant intended to file an action elsewhere. Congress in enacting 28 USC Sec. 1391 permitting a defendant to have the action against him tried in the judicial district of his residence is liberally construed, to the end that a defendant may not be unjustly deprived of that right.

Whether the lower court reckoned that counsel was hedging during arguments on the motion for dismissal

is not of serious import. Counsel for appellant gave indications that something akin to a game of hounds and fox was contemplated and it was not precisely made clear what future vexatious action was planned if a dismissal was to be authorized. In view of the fact appellant could have lawfully amended its complaint in this case and joined the surety as an additional defendant, pursuant to the authority of *Texas Construction Company and U. S. F. & G. Co., v. United States of America for the use of Caldwell Foundry and Machine Company, Inc.,* supra, there was absolutely no justifiable or valid reason for a dismissal where prejudice would, in fact, result to appellees.

The Rules of Civil Procedure 41(a)(2) manifestly vest in the trial court a reasonable discretion on a motion for a voluntary dismissal, and in the exercise of this discretion, the Court considers the relative positions of the parties and determines whether prejudice will develop therefrom. That prejudice will result to appellees is found (Tr. 36) in the fact that all the records of appellees respecting this action and their witnesses are located in Oregon; also that appellees have made preparations for the trial.

As pointed out in *Ockert v. Union Barge Line Corp.,* 190 F. 2d 303 (3rd):

> ". . . It is likewise an increasingly burdensome matter to one's opponent if a case has been prepared, trial date set and the party and his witnesses on hand and ready for trial. . ."

At one time it was believed that the fact a defendant would only be subjected to annoyance by the filing

of a second litigation was not deemed such substantial prejudice as to deny a plaintiff the right to a voluntary dismissal. Such a belief has now been absolutely discarded, and the day is past when the right of dismissal may be initiated by a plaintiff on an unilateral basis only.

In *Piedmont Interstate Fair Ass'n. v. Bean,* 209 F. 2d 942 (4th), the Court said:

> "The prejudice to the defendant which justifies the Court in refusing permission to the plaintiff to dismiss is more carefully considered, and it is no longer true to say, as was so often said in decisions preceding the Federal Rules, that 'the incidental annoyance of a second litigation upon the subject matter' furnishes no ground for denying the plaintiff permission to dismiss his complaint."

It is also well established law that, the allowance of a motion to dismiss under Rule 41(a)(2) is not a matter of right, but is discretionary with the District Court *both* as to whether a dismissal shall be allowed as well as to the terms and conditions to be imposed if allowed. *Adney v. Mississippi Lime Company of Missouri,* 241 F. 2d 43 (7th); *Grivas v. Parmelee Transportation Co.,* 207 F. 2d 334, Cert. denied 347 U.S. 913, 74 S. Ct. 477, 97 L. Ed. 1069.

Appellant assumed a position in the proceedings below which was tantamount to defiance of the order of court to appear for pretrial conference, which made it extremely burdensome upon appellees. A due and proper preparation for any trial requires conferences with witnesses who often are corralled with difficulty, and, too,

those witnesses must be kept available as the exigencies of the case demand.

Also, the efficiency of a court depends on strict observance to its orders, and without it, the administration of justice becomes a mockery. The Civil Rules of Procedure were specifically adopted to expedite the court's business and a party who undertakes to institute and action is duty bound to adhere to those rules. In this case appellant chooses capriciously and without right to move the goal posts to serve its own conveniences and despite the order of court to prosecute with due diligence.

A non-compliance with the Rules of Civil Procedure justifies dismissal of a cause.

Rule 41(2)(b), Rules of Civil Procedure.
Collins v. Wayland, et al, 139 F. 2d 677 (9th).
Mooney v. Central Motor Lines, Inc., 222 F. 2d 569 (6th).
Hubbard v. The B. & O. R. R. Co., 249 F. 2d 885.
Wisdom v. Texas Co., 27 F. Supp. 992.

CONCLUSION

The allowance of a motion to dismiss is a matter for the discretion of the trial court, and since the primary objectives assigned by appellant for a dismissal are untenable and would be improper, the trial court did not act unfairly or arbitrarily in requiring appellant to continue with the prosecution of its action and prepare for pretrial conference.

This Court in denying appellant's petition for a Writ of Mandamus in Case No. 16071, said ". . . in refusing to

permit the action to be dismissed after answer had been filed, (the court) was acting within the limits of discretion . . ." The record in this case on the appeal contains the same facts and circumstances presented in the petition for the writ of mandamus.

There being no clear abuse of discretion the order should be affirmed.

Respectfully submitted,

LEO LEVENSON,
NORMAN B. KOBIN,
Attorneys for Apellees.

No. 16206

IN THE

United States Court of Appeals

For the Ninth Circuit

BLUE MOUNTAIN CONSTRUCTION COMPANY, a corporation,
Appellant,
vs.
H. C. WERNER and TAUF CHARNESKI,
Appellees.
No. 16206

PETITION FOR REHEARING ADDRESSED TO CIRCUIT JUDGES ORR, HEALY AND FEE

Appeal from the United States District Court for the District of Oregon

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JEROME WILLIAMS
CASHATT & WILLIAMS
1121 Paulsen Building
Spokane, Washington
Attorneys for Appellant

NATIONAL PRINTING CO. 74644

No. 16206

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CASHATT & WILLIAMS
1121 Paulsen Building
Spokane, Washington
Attorneys for Appellant

NATIONAL PRINTING CO. 74644

Appellant respectfully petitions the Honorable Judges who constituted the Court on the original hearing of this appeal that a rehearing, preferably en banc, be granted in this matter.

The opinion filed August 19, 1959 affirming the judgment of the District Court, was by a divided Court, with Judges Orr and Fee for affirmance and Judge Healy of the opinion that the District Court judgment should be reversed. Naturally we espouse the dissenting opinion of Judge Healy, but we do earnestly feel and submit that the reasons advanced in the majority opinion of Judge Orr, on which the affirmance is based, merit reconsideration.

The conclusion reached by Judge Orr appears to be based on the fact, and it is a fact, that appellant in support of its motion for a voluntary dismissal without prejudice, made no showing that the appellees were insolvent, the opinion stating at page 3,

> "However, it nowhere appears that it was necessary to sue the sureties, no showing being made that the appellees are insolvent."

and the opinion goes on to say,

> "As against this lack of showing on the part of appellant, the trial court was justified in turning to the other side of the coin."

We earnestly submit to the Court that the solvency or insolvency of the individual defendants should not be a determining factor in this matter. The paramount reason for this is that defendants, and particularly defendants who are individual persons as distinguished from established corporations, may well be entirely solvent when litigation is commenced and

thoroughly insolvent and judgment proof when the litigation has eventually been reduced to judgment. As this case was postured before the District Court of Oregon, there was no way under the law to insure that these defendants, though they may have been solvent at the time the action was commenced, would be solvent at its termination, so as to respond to a judgment. Individual defendants such as these may or may not be insolvent, and there is no practical way for a stranger to their affairs, such as appellant here, to determine this so as to know whether it is necessary to sue the sureties, and likewise no way to obtain information on which to base a claim or showing of insolvency.

The very purpose of the Miller Act in requiring a surety bond to protect appellant, if it has the rights it claims to have under the Miller Act, is to remove this uncertainty of payment as to those who furnish labor and materials in the performance of government contracts. The Miller Act provides for a bond to protect suppliers for the very reason that one may furnish labor and materials to another who is then solvent and able to pay but who at a later time, by reason of the uncertainties of business life, may become insolvent.

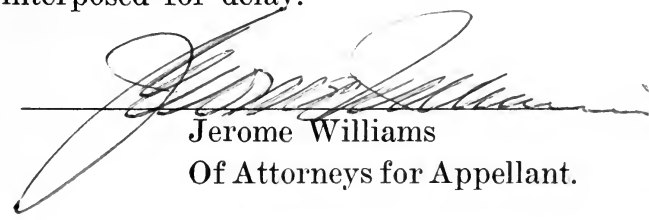
This premise on which the majority opinion has been based was nowhere discussed in either of appellant's briefs nor in appellees' brief and, to the best of our recollection, was likewise not discussed on the oral arguments at the original hearing. We earnestly submit that there should be a rehearing for this reason alone.

Furthermore, this case is unusual in that the result reached by the majority might represent the loss to appellant of most substantial rights without the processes of the law having afforded appellant its full day in court by way of a hearing on the merits. Litigation does not often take such a turn in present-day practice, and we suggest that a dismissal with prejudice without a hearing on the merits of substantial litigation such as this is a matter that well deserves the attention of the full Court by way of a rehearing en banc, especially where the three judges who originally heard this appeal had divergent views.

Respectfully submitted,

JEROME WILLIAMS
CASHATT & WILLIAMS
Attorneys for Appellant.

The undersigned, one of counsel for the appellant herein, certifies to the Court that in his judgment the within petition for rehearing is well founded and that it is not interposed for delay.



Jerome Williams
Of Attorneys for Appellant.

No. 16206

IN THE

United States Court of Appeals

For the Ninth Circuit

BLUE MOUNTAIN CONSTRUCTION COMPANY, a Corporation,
Appellant,

vs.

H. C. WERNER and TAUF CHARNESKI,
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No. 16206

Appeal from the United States District Court for the District of Oregon

HON. GUS J. SOLOMON, *Judge*

APPELLANT'S REPLY BRIEF

JEROME WILLIAMS
CASHATT & WILLIAMS
Attorneys for Appellant
1121 Paulsen Building
Spokane, Washington

NATIONAL PRINTING CO 73979

No. 16206

IN THE

United States Court of Appeals

For the Ninth Circuit

BLUE MOUNTAIN CONSTRUCTION COMPANY, a Corporation,
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vs.

H. C. WERNER and TAUF CHARNESKI,
Appellees.

No. 16206

Appeal from the United States District Court for the District of Oregon

HON. GUS J. SOLOMON, *Judge*

APPELLANT'S REPLY BRIEF

JEROME WILLIAMS
CASHATT & WILLIAMS
Attorneys for Appellant
1121 Paulsen Building
Spokane, Washington

NATIONAL PRINTING CO 73979

We will only concern ourselves in this reply brief with what appears to be the principal contention in appellees' brief. That contention, as we understand it, is that appellant's motion for a voluntary dismissal was properly denied by Judge Solomon because appellant was not required as a matter of jurisdiction to bring its contemplated Miller Act suit in the Eastern District of Washington, but could have by amendment brought the appellees' sureties into the Oregon District Court action. We will shortly demonstrate how specious this contention is, but we first point out to the Court that no such position was advanced to the District Judge nor suggested by him as supporting the denial of our dismissal motion.

It is quite true that the Court of Appeals for the Fifth Circuit in the case of *Texas Construction Co. v. U. S.,* 236 Fed. (2d) 138, has held, as appellees' counsel have apparently quite lately discovered, that the requirement of the Miller Act that an action on the bond shall be brought in the district "in which the contract was to be performed and executed and not elsewhere" relates to venue rather than jurisdiction and that an action brought in another district may proceed, in the absence of objection to venue by the defendant contractor or sureties.

We do not think it is necessary to here question the correctness of that decision, but we do point out that it was reached under most unusual circumstances and is seemingly in direct conflict with *U. S. v. Congress Construction Co.,* 222 U. S. 199, 56 L.ed. 163, which latter decision has been cited and followed on

innumerable occasions, and has never been criticized by the Supreme Court.

Assuming, however, that the above-quoted portion of the Miller Act does in fact relate to venue, it is to be remembered that the Miller Act elsewhere requires that suits upon the bond be brought within one year from the date of final settlement of the contract. It is an astounding suggestion that an attorney for a subcontractor should flirt with a loss of his client's rights through expiration of the period of limitations by bringing an action in the wrong district and hoping that the defendant sureties will waive objection to the venue. Moreover, what assurance would one have that the *Texas Construction Co.* case would be followed in another circuit? In this case, the only safe and proper place in which an action upon the appellees' bond could be brought was the Eastern District of Washington, whether the above-quoted provision relates to venue or jurisdiction.

Appellees' counsel did not represent the sureties at the time of the hearing and could not speak for them, as was brought out by colloquy between court and counsel at the hearing (Tr. 37). The record contains utterly nothing to indicate or warrant any claim that the interested sureties would have voluntarily appeared and consented to the Miller Act jurisdiction of the Oregon District Court, nor does it even appear that they were amenable to service there.

In any event, it was not necessarily incumbent on appellant to show reasons for its desire for a voluntary dismissal. As the cases cited in our opening

brief demonstrate, the determining question on such a motion is whether the defendants (appellees) would suffer some prejudice by the granting of the motion which could not be compensated by the imposition of terms. Here it is quite clear that terms would have adequately compensated appellees who had done no more than prepare and file an answer. Thus it is our position that the motion for dismissal should have been granted, even if appellant had not made the strong affirmative showing that it did as to why appellant sought the dismissal.

We again submit that, whether a matter of venue or jurisdiction, appellant's expressed reason for desiring the voluntary dismissal—so as to have a clear field to test its claimed rights under the Miller Act in the Eastern District of Washington—was a most compelling reason in support of the motion for dismissal. We further submit that the record affirmatively discloses a complete absence of reason or justification for the denial of appellant's dismissal motion at the early stage of the proceedings at which it was made, a matter of only forty-four days after the commencement of the action.

Respectfully submitted,

JEROME WILLIAMS
CASHATT & WILLIAMS
Attorneys for Appellant
1121 Paulsen Building
Spokane, Washington.

No. 16,213

IN THE

United States Court of Appeals

For the Ninth Circuit

GUAM INVESTMENT COMPANY, INC., et al.,
Appellants,

vs.

CENTRAL BUILDING, INC., et al.,
Appellees.

On Appeal from the District Court of Guam for the Unincorporated Territory of Guam.

APPELLANTS' OPENING BRIEF.

FINTON J. PHELAN, JR.,
Suite 201-203, Mesa Building,
First Street West,
Agana, Guam,

JOHN F. ALEXANDER,
400 Trustco Building,
250 South King Street,
Honolulu 1, Hawaii,

Attorneys for Appellants.

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No. 16,213

IN THE

United States Court of Appeals

For the Ninth Circuit

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Appellees.

On Appeal from the District Court of Guam for the Unincorporated Territory of Guam.

APPELLANTS' OPENING BRIEF.

JURISDICTION.

This is an appeal from the Orders Dismissing Complaint entered by the District Court of Guam on the 10th day of June, 1958. Jurisdiction to hear this appeal is in this Court, pursuant to the provisions of Sections 1291, 1294, Title 28 U.S.C.A., as amended. This action arose under the statutes of the unincorporated territory of Guam, and is between citizens of that territory and one party is the citizen of the Territory of Hawaii.

STATEMENT OF THE CASE AND QUESTIONS PRESENTED.

Guam Investment Company, Inc., is a corporation of the unincorporated territory of Guam. Kenneth Dang is a citizen and resident of the Territory of Hawaii. Defendants Central Building, Inc., Guam Savings and Loan Association, Inc., and Marianas Finance Company, Inc., are all corporations of the unincorporated territory of Guam. All individual defendants except Elizabeth S. Lujan are citizens of the United States of America and residents of Guam. Elizabeth S. Lujan is a resident of Guam and is on information and belief, a citizen of the Republic of the Philippines.

Defendant Central Building, Inc., was formed in the year 1953 and constructed on leased land a building known as the Central Building during that same year. During 1954 and 1955, various actions were commenced in the District Court of Guam against the defendant Central Building, Inc., including the case of Pan American World-Wide Airways sometime on or about the 19th day of September 1954.

Defendant Guam Savings and Loan Association purported to lend to Central Building, Inc., Fifty Thousand Dollars ($50,000.00) allegedly secured by mortgage, which mortgage though claimed filed on the 10th day of September 1954, was not recorded until the 5th day of June, 1955.

On the 22nd day of July, 1954, a Confession of Judgment was executed on behalf of defendant, Cen-

tral Building, Inc., in the action brought by Pan American World-Wide Airways, in which action, pursuant to a Judgment and Writ of Execution, a judicial sale was held, selling all the right, title and interest of Central Building, Inc., to the plaintiff, Kenneth Dang, and the Marshal's Certificate was filed in the District Court of Guam on the 15th day of August, 1955 and recorded on the following day in the Land Records of the Government of Guam. No redemption on this sale has ever been attempted. The sale was made pursuant to publication and was a public sale.

On the 19th day of March, 1955 a portion of the Central Building was leased to plaintiff, Guam Investment Company, Inc., for a period of five years with four successive options for the same period and said plaintiff paid in advance therefor the sum of Twenty-Five Thousand Dollars ($25,000.00), the said lease being recorded in Land Records of the Government of Guam on the 21st day of March, 1955.

At the same time of the execution of this lease, a Security Mortgage was executed to secure plaintiff Guam Investment Company's advance and was recorded on the same date as the mortgage given to plaintiff. On or about the 19th day of March, 1955 the purported mortgage to Guam Savings and Loan Association, Inc., allegedly being behind in payments, plaintiff Kenneth Dang, as president of plaintiff, Guam Investment Company, Inc., paid to defendant, Guam Savings and Loan Association, Inc., the sum necessary to bring the alleged payments up to date.

This payment was made upon advice of then counsel. Subsequent to that payment, Central Building, Inc., made no further payment.

On the 11th day of August, 1955 defendant Guam Savings and Loan, Inc., filed an action to foreclose the aforementioned mortgage and as a result of said action, a Decree of Foreclosure was entered and the said Central Building was sold by the Island Court of Guam to defendant Guam Savings and Loan, Inc.; in that foreclosure action an employee of defendant Guam Savings and Loan Association, Inc., was appointed receiver of the Central Building.

At the time of the sale to plaintiff Kenneth Dang of the interest of Central Building, Inc., a public sale after due notice, none of the defendants appeared, bid or took other steps to assert or protect their rights.

On the 26th day of July, 1956 defendant Guam Savings and Loan, Inc. executed its quit-claim deed to Marianas Finance Company, Inc., of its interest in Central Building. At the time of the foreclosure of the alleged mortgage by Guam Savings and Loan Association, Inc., on the property of the Central Building, Inc., agents of defendant Guam Savings and Loan Association, Inc. advised plaintiff Kenneth Dang to abstain from participating in such proceedings for the purpose of facilitating illegal foreclosure. Defendant Guam Savings and Loan Association, Inc., proceeded with the foreclosure and claimed to have secured a full and complete title to said property and that any rights of plaintiff had been severed by that action.

Accordingly, on the 28th day of March, 1958 the instant action was filed and service obtained upon the defendants. After various motions for an extension of time in which to answer or plead, simultaneous motions were filed on behalf of all defendants, that of Guam Savings and Loan Association, Inc. and Marianas Finance Company, Inc. being on the ground of Res Judicata, said motion being more in the nature of an answer, and on the part of the other defendants, a motion that the complaint failed to state a cause of action and upon Res Judicata.

After an oral argument, the District Court of Guam sustained these motions on the ground of Res Judicata.

We are faced with certain questions in this action as to whether or not in view of the complaint and the allegations therein contained, particularly the allegation of previous sale to plaintiff Kenneth Dang, knowledge of defendants alleged in the complaint of the payment by plaintiff Guam Investment Company, Inc. to defendant Guam Savings and Loan Association, Inc. on behalf of defendant Central Building, Inc., knowledge of the mortgage recorded on the 21st day of March, 1955 of the Central Building, Inc. to plaintiff Guam Investment Company, Inc., the allegation of the conversion of the chattels of Guam Investment Company, Inc., and the allegations of the conspiracy to assist foreclosure of the mortgage, as to whether or not the Execution of Sale to Kenneth Dang was not prior to the alleged mortgage to Guam Savings and Loan Association and whether or not

defendants are not charged with knowledge of said sale, as to whether or not the mortgage to plaintiff Guam Investment Company, Inc. was not a prior mortgage, and can a foreclosure action brought by defendant Guam Savings and Loan Association, Inc. preclude or affect prior rights and therefore, can such rights be litigated in a foreclosure action and such action be Res Judicata.

We are further faced with the question as to whether or not the failure to redeem from the sale of August 15, 1955, pursuant to Confession of Judgment filed on the 22nd day of July, 1955 does not cut off all subsequent rights of the parties. The further question is presented as to whether or not a valid claim for certain chattels and fixtures for plaintiffs was not asserted, which chattels and fixtures and personal property would not be determined in an action to foreclose a mortgage upon real estate. The collateral question, of course, arises and it would seem not to be barred for any estoppel as to whether or not, if not in fact, the sale to plaintiff Keneth Dang was superior and accounting should not have been ordered of the rents and profits.

Defendant Marianas Finance Company, Inc. as to Guam Savings and Loan Company, Inc. is a privity of this action, the property having been quit-claimed to said defendant. Plaintiffs seek judgment cancelling the marshal's deed of Central Building property to defendant Guam Savings and Loan, Inc., subsequently conveyed to Marianas Finance Company, Inc., and as shown here by an accounting of the rents, proceeds and for a judgment value for chattels converted and

that the plaintiff Kenneth Dang be declared the owner of the Central Building, Inc. pursuant to the original marshal's deed, or in the alternative, that the mortgage held by Guam Investment Company, Inc. be declared a prior lien on the Central Building.

Guam Savings and Loan Association, Inc. and Marianas Finance Company, Inc. set forth in their motion filed on the 13th day of May, 1958 that their foreclosure action was commenced on the 23rd day of January, 1956, in which they purported to name all parties claiming an interest in the assets of the Central Building and claimed that their foreclosure judgment is Res Judicata.

Paragraph 2 contained in Page 14 of the Transcript of Record clearly shows that this action, Civil Number 49-55, was a foreclosure action and also decided that all issues raised in the complaint had been decided in that foreclosure case. In the order entered on the same day with respect to the motion of Central Building, Inc., and its incorporators and stockholders that the complaint does not state a cause of action against said defendant, appellants believe the court was in error in its application of the rule of Res Judicata and that there was clearly an error in holding that all issues in the complaint had been previously litigated.

Appellants assert that the questions presented as to whether or not a superior title can be litigated in an action to foreclose a junior encumbrance and the further point to be determined is whether or not the court was in error in failing to take notice of the

executed sale held under its own order on the 22nd day of July, 1954 and confirmed by the court.

A further point to be determined is whether or not the court was not in error when it held a mortgage made subsequent to the execution sale of July 22, 1954 was superior to the title passed by such execution sale. The further question to be determined as to whether or not the court did not misconstrue the law on mortgages and whether or not it should not have directed an accounting of both the proceeds of the building and chattels of appellants. Appellants believe that it is a self-evident fact that foreclosure action can only determine certain issues and the allegations of the complaint in the instant action could not be all fully determined in such an action, that their rights and titles prior and superior to a mortgage cannot be litigated in an action to foreclose a junior encumbrance, and that the court should take judicial knowledge of its actions with respect to the same subject matter.

It is the view of the appellants that this controversy is as to the priority of rights of plaintiff Dang and plaintiff Guam Investment Company as to whether or not all issues have been previously litigated and substantially whether or not the issues in this matter should not be decided after the presentation of evidence and not upon a simple motion presumably under Rule 12 and the provisions of Rule 8 of the Rules of Civil Procedure.

STATUTES AND RULES INVOLVED.

Civil Code, Territory of Guam.

Section 2897. *Priority of liens.* Other things being equal, different liens upon the same property have priority according to the time of their creation, except in cases of bottomry and respondentia.

Code of Civil Procedure.

Section 674. *Judgment a lien upon recording of abstract.* An abstract of the judgment or decree of any court of record of Guam, or of the United States, the enforcement of which has not been stayed on appeal, certified by the clerk of the court where such judgment or decree was rendered, may be filed with the Director of Land Management and from such filing the judgment or decree becomes a lien upon all the real property of the judgment debtor, not exempt from execution, owned by him at the time, or which he may afterwards and before the lien expires, acquire. Such lien continues for five years from the date of the entry of the judgment or decree, unless the enforcement of the judgment or decree is stayed on appeal by the execution of a sufficient undertaking as provided in this code, or by statutes of the United States, in which case the lien of the judgment or decree, and any lien or liability now existing or hereafter created by virtue of an attachment that has been issued and levied in the action, unless otherwise by statutes of the United States provided, ceases, or upon an undertaking on release of attachment, or unless the judgment or decree previously satisfied, or the lien otherwise discharged. The abstract above mentioned shall contain the following: Title of

the court and cause and number of the action; date of entry of the judgment or decree; names of the judgment debtor and of the judgment creditor; amount of the judgment or decree, and where entered in judgment book.

Section 700. *Sale of real property, what purchaser acquires.* Upon a sale of real property, the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor thereto on the date of the levy of the execution thereon, where such judgment is not a lien upon such property; if the judgment is a lien upon the real property the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor on or at any time after the day such judgment became a lien on such property; and in case property, real or personal, has been attached in the action, the purchaser is substituted to and acquires time after the day the attachment was levied upon such property.

Section 701. *Real property so sold, by whom it may be redeemed.* Property sold subject to redemption, as provided in the last section, or any part sold separately, may be redeemed in the manner hereinafter provided, by the following persons, or their successors in interest:

1. The judgment debtor, or his successor in interest, in the whole or any part of the property;

2. A creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold. The persons mentioned in the second subdivision of this section are, in this chapter, termed redemptioners.

Section 702, as amended. *Redemption of Property, How and When.* The judgment debtor, or redemptioner, may redeem the property from the purchaser any time within 12 months after the sale on paying the purchaser the amount of his purchase, with 1 per cent per month thereon in addition, up to the time of redemption, together with the amount of any assessment or taxes which the purchaser may have paid thereon after purchase and interest on such amount. And if the purchaser be also a creditor, having a prior lien to that of the redemptioner other than the judgment under which said purchase was made, the amount of such lien with interest.

Section 726c. *Sale of the mortgaged property.* When the defendant, after being directed to do so, as provided in the last preceding section, fails to pay the principal, interest, and costs at the time directed in the order, the court shall order the property (or so much thereof as may be necessary) to be sold in the manner and under the regulations that govern sales of real estate under execution; but such sale shall not affect the rights of persons holding prior incumbrances upon the same estate or a part thereof. The sale, when confirmed by decree of the court, shall operate to divest the rights of all the parties to the action and to vest their rights in the purchaser. Should the court decline to confirm the sale, for good cause shown, and should set it aside, it shall order a resale in accordance with law.

F.R.C.P.

Rule 8(c) *Affirmative Defenses.* In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and

award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

Rule 12(b) *How presented.* Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief

can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

SUMMARY OF ARGUMENT.

Briefly, before considering the argument two key factors must be remembered. First, all cases in the District Court of Guam are handled in accordance with the federal rules of civil procedure and second, cases arising under the statutes of the territory of Guam are construed from a substantive law point of view in accordance with local rules of construction, thus it is as if we had a Federal District Court using its own procedures ruling on a local case arising under the statutes of a state.

Appellants claim that the District Court erred in applying the doctrine of res judicata in this case and that the file of this case discloses no basis for such application, as is shown by the numerous federal and California cases cited. Further, the files disclose that certain matters contained in the complaint could not have been determined in a foreclosure proceeding although the case upon which the District Court of Guam relied as res judicata was in fact a foreclosure proceeding.

Further, the files, and there is nothing else in this case except pleadings, clearly disclose that all issues

could not have been determined by a previous case and could not have been determined between the parties since they could not have been determined in any previous case, particularly the one relied upon.

Appellants also contend that the District Court of Guam was gravely in error by holding, contrary to the statutes, that a claim of superior right could be litigated in a foreclosure action when a junior encumbrance is sought to be foreclosed. The California cases in particular clearly make such plain. Appellants also contend that the District Court of Guam was in error in its application of judicial knowledge in the light of the cited cases, particularly in the case cited in a similar instance and decided by the Court of Appeals of this circuit. Even in res judicata there must be sufficient in the record upon which to sustain such a holding when the basis for such a ruling is not apparent upon the face of the pleadings. Otherwise, a holding unsupported by any factual demonstration will forever preclude a litigant whenever a court made a finding of res judicata without anything to support such a finding other than the opinion of the court. Appellants contend that the error is obvious. The District Court ignored the principles of priority of liens and ignored its own act in approving a sale prior to the effective date of the mortgage of the appellees. Such a fundamental error should not pass unnoticed.

The District Court was also in error in not directing an accounting of both the Central Building and of the chattels since such an accounting would have furnished sufficient basis upon which to rest its hold-

ing. The District Court gravely erred in that the statutes clearly prescribe the priority of liens and the steps to be taken in enforcing such. They clearly delineate the rights of all parties. These questions are matters of fact to be proven by evidence. Further, the fact of the judgment sale was totally disregarded despite the provisions of the statutes. In the argument this is set forth at length.

As a conclusion, appellants contend that the District Court was in error and that this entire matter should be remanded to the District Court for such further proceedings as may be appropriate and that appellees should be required to answer or move to the complaint.

ARGUMENT.

Before commencing the argument in this case, two facts on which the entire stand of appellants is premised must be set forth. First, all proceedings in the District Court of Guam, except so much as they may be affected by the unrepealed provisions of the Conformity Act, must under previous decisions of this court, be conducted in conformity with federal rules of civil procedure and in effect, handled as arising under federal jurisdiction. Second, that in applying substantive law arising under and cases hinging thereon, the statutes of the unincorporated territory of Guam, the District Court of Guam though sitting as a legislative court of dual jurisdiction and though acting under the provisions of the federal rules of civil pro-

cedure, must determine those facts and apply that law as if it were a Supreme Court of the territory.

Appellants believe that in the absence of reported decisions of the District Court of Guam construing territorial statutes, the best guide is the decisions of the courts of record of the State of California insofar as certain statutory provisions were copied from the codes of the State of California. Since basically the original code of Guam, a fact of which this court may take notice, was enacted in the years 1932 to 1933, based upon an adoption of certain, though not all of the codes of the State of California, it is believed that a fair and reasonable assumption is that insofar as justice or law will permit, any sections of the codes of the unincorporated territory of Guam not adopted verbatim from those of the State of California should be construed wherever possible in consonance with the judicial concepts of that state. This appellants believe to be a rule of substantive justice in view of the fact that essentially the basic principles of the laws and statutes of the unincorporated territory of Guam are those of the State of California.

In the interests of having a unified system of laws, it is believed that this is the logical approach to an analysis of the codes of Guam. Appellants believe that in such instances as a statute has been adopted from another jurisdiction without any change other than names, dates or places, in the absence of local instruction to the contrary, the best, if not the ruling, guide is the interpretation placed upon such statutory provisions by the highest court of the jurisdiction

from which adopted and further that in accordance with simple reason and logic, such statutory provisions, whether or not copied in toto or whether of local draftsmanship should be interpreted in the light of the basic principles of the jurisdiction from which the foundations of the local code were adopted. Therefore, it is believed that no authorities are necessary to cite to support the position in the absence of any local constructions.

The constructions placed on a statutory provision copied verbatim from the codes of the State of California should be as a rule of law constructed as construed by the Supreme Court of California and that other sections not so copied should be constructed with the highest respect paid to the decisions of the codes of the State of California. It is in the light of these basic principles both, appellants believe, of law and fundamental logic that the argument has been evolved.

I.

THE DISTRICT COURT OF GUAM WAS IN ERROR IN HOLDING THAT THE DOCTRINE OF RES JUDICATA APPLIED IN THIS CASE.

Appellants believe that the principles of res judicata require no statement of authorities since they are fundamental and known to all, and believe that they are fundamentally that litigation shall determine with respect to the same litigants or their privities, the same subject matter, the same claims and the same

facts of evidence as are thereafter to be held res judicata as to all the parties. However, appellants believe that it is the application of these basic principles wherein the errors arise.

In the instant case a complaint was filed which alleged various facts, including the claim of a superior and prior right and title to the subject matter of this action and made further allegations including the conversion of chattels, fraud and sought relief in accordance with the theory of the complaint. No evidence was taken at the hearing on the motion. The motion of all defendants was based on res judicata and that of part of the defendants was based upon the failure to state a claim. The doctrine of res judicata was applied with respect to a previous action in which defendants Guam Savings and Loan Association, Inc. had filed suit against defendants Central Building, Inc. upon a mortgage seeking its foreclosure and had named numerous defendants including the present plaintiff Kenneth Dang as parties to the action. The District Court of Guam accordingly took judicial notice of this foreclosure action, and in the light of that judicial notice held that all issues between all parties had been previously determined. It is obvious, as will be shown later, that certain issues raised by the complaint were not and could not have been litigated in a foreclosure action.

First, in a foreclosure action, which is the statutory enforcement of a lien, only certain matters can be properly tried, and second, certain of these issues are subsequent to the action for foreclosure and therefore

by no system of logic could be presumed to have been litigated. Res judicata, in certain cases where the facts or evidence shown in the complaint and the other pleadings on matters in evidence before the court, may be decided with nothing further in the light of certain decisions though contrary to the plain meaning of the rule permitted to be raised on motions. However, in the majority of cases it would appear that the rule must prevail.

Rule 8(c) is quite explicit with respect to this. In the absence, from the record of this case, of sufficient evidence including testimony, affidavits, exhibits or certified records, can it be held that this action is a proper one in which to apply res judicata? Appellant contends otherwise, and believes that the general rules cover this case and there was error in attempting to apply the doctrine of res judicata. Support is found in the following cases.

> ". . . We take judicial notice of proceedings in our own court, and are mindful of the fact that appellant prosecuted an appeal from an adverse judgment in a former action by him and that the former action was founded upon a written contract. Zeligson v. Hartman-Blair, Inc., 10 Cir., 126 F.2d 595. No doubt that judgment will present itself as a barrier at some stage of this case, but whether plaintiff can hurdle it cannot be determined on a motion directed to the sufficiency of the complaint. Res Judicata, estoppel, or any other matter constituting an avoidance or affirmative defense must be affirmatively pleaded. Rule 8(c), Rules of Civil Procedure, 28 U.S.C.A. following section 723c. Such defenses may not be

raised by a motion addressed to the sufficiency of the complaint. . . ."

Zeligson v. Hartman-Blair, 135 F.2d 874.

". . . With respect to a specific affirmative defense such as res judicata, the rule seems to be that if the facts are admitted or are not controverted or are conclusively established so that nothing further can be developed by a trial of the issue, the matter may be disposed of upon a motion to dismiss whether the decision of the District Court be considered as having been arrived at under the provisions of Rule 12(b) (6) or Rule 56(c), F.R.C.P., 28 U.S.C.A.2 Moore's Federal Practice (2nd Ed.) 1698, 2256, 2257; Chappell v. Goltsman, 5 Cir., 186 F.2d 215, 218. . . ."

Larter & Sons v. Dinkler Hotels Co., 199 F.2d 855.

". . . At the oral argument, defendants' attorney argued two reasons in support of the motion, the principal reason being res judicata. Under Rule 8(c) res judicata is deemed an affirmative defense. The complaint in this action avers facts meagerly which defendants rely upon as res judicata, but these facts are not sufficiently averred so that the Court can determine whether the same constitutes res judicata or not. I am of the opinion that the facts in this case should be more fully developed before the questions involved are passed upon by this Court; and for the reason that the Court cannot say under Rule 12(b) that the complaint fails to state a claim upon which relief can be granted, the motion to dismiss should be refused. . . ."

McRanie v. Palmer, 2 F.R.D. 479.

". . . Ordinarily, the defense of res judicata cannot be considered except when pleaded as defensive matter. But on a suit to set aside a judgment, which judgment of course must be alleged in the complaint, the effect of that judgment must be considered when determining whether or not the complaint states a cause of action on a demurrer or a motion to dismiss.

"That does not preclude a defendant, however, from asserting res judicata as a special defense or claiming that other facts or issues were adjudicated which do not appear on the face of the complaint.

"The doctrine of res judicata has been variously stated. Without repeating all the definitions and the varying shades of thought, let it suffice to quote from 34 Corpus Juris page 743, Paragraph 1154, '*Any right, fact, or matter in issue, and directly adjudicated upon, or necessarily involved in,* the determination of an action before a competent court, in which a judgment or decree is rendered upon the merits, is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject matter of the two suits is the same or not.' . . ."

United States v. Kusche, 56 F. Supp. 201.

The California Courts in discussing the question of res judicata in similar types of cases involving foreclosures and mortgages have followed the same basic principles based upon their interpretation of the rights derived from substantive law and the following cases from the Supreme Court of California support the position of appellants.

". . . Where, the plaintiffs in the action to quiet title, having a title prior, adverse, and paramount to that of the mortgage, were made parties defendant to the foreclosure thereof, under the usual allegations in the complaint that the defendants other than the mortgagor claim some interest in the premises, and that such interest is subsequent and subordinate to that created by the mortgage, without setting forth the particulars of the defendant's claim, or showing that it was prior in time to the mortgage, the judgment of foreclosure does not become res judicata as to the prior adverse title of the plaintiffs. . . ."

Beronio v. Ventura Lbr. Co., 129 C. 232, 79 Am. St. Rep. 118, 61 P. 958.

". . . The principle that adverse titles cannot be litigated in a foreclosure suit, and are not affected by the decrees of foreclosure, applies as well to adverse equitable estates as to legal estates. . . ."

Murray v. Etchepare, 129 C. 318, 61 P. 930.

". . . The paramount title of the purchaser at sheriff's sale is not a proper subject of litigation in a subsequent action to foreclose the mortgage, and if not expressly adjudicated in such action cannot be affected by the decrees of foreclosure, nor by the sheriff's sale under the decree. . . .

". . . Where the purchaser at the sheriff's sale was made a party defendant to the foreclosure suit, under an averment that his interest was subject and subordinate to that of the mortgagee, and he took issue upon that averment, and pleaded his title as paramount thereto, and all paramount rights of defendants, excepting the defendant mortgagor, were reserved in the decree, such pur-

chaser is not estopped by the decree from asserting his paramount right in an action by him to quiet his title against the purchaser under the decree of foreclosure. . . ."

Cady v. Purser, 131 C. 552, 82 Am. St. Rep. 391, 63 P. 844.

Therefore, appellants believe that the application of the doctrine of res judicata in the instant case was error.

II.

THE DISTRICT COURT OF GUAM WAS IN ERROR IN HOLDING THAT ALL ISSUES OF PARTIES HAD BEEN PREVIOUSLY LITIGATED.

It is clear from the orders of the District Court of Guam dismissing the complaint in the instant case that the case upon which the court relied for the application of res judicata and its finding that all issues and matters between all parties had previously been determined is in error and furthermore that in the absence from the records of Civil Case #49-55 in the District Court of Guam, upon which record the court rested its decision, it is impossible for this court or any other court to determine whether or not all or any issues had been so determined or resolved. The records and files of that case were never introduced in evidence. Furthermore, this court may, appellants believe, take cognizance of the fact that in a foreclosure action there are only certain matters that may be litigated and that certain matters, if brought, being

extraneous to the purpose of the case, are of no effect, being in essence, surplusage.

Since the complaint alleged a fraud and a conspiracy and sought relief for the conversion of chattels, sought to set aside a judicial sale, sought accounting for the value of chattels and for income of properties claimed to belong to plaintiffs, it is quite obvious that all matters in controversy between the parties could not have previously been determined in a foreclosure action.

Therefore, appellants contend that it must be held that all matters could not have been and were not determined in the former action and furthermore that if certain of these matters, including a superior title and a prior lien, had been purported to be so determined, such would have been null and void. Therefore, appellants contend the District Court of Guam was in error in holding that all issues between the parties had been previously litigated.

III.

THE DISTRICT COURT OF GUAM WAS IN ERROR IN HOLDING THAT A CLAIM OF SUPERIOR RIGHT COULD BE LITIGATED IN A FORECLOSURE ACTION SEEKING THE FORECLOSURE OF A JUNIOR OR INFERIOR RIGHT.

The matter of precedence of liens and title is a matter of substantive law and therefore, the statutes of the unincorporated territory of Guam as interpreted by the Supreme Court of California in such cases as the statute was adopted verbatim is, we believe, the

law which must be applied and as to other statutes, the best guide available. Whether or not a lien is prior is, appellants contend, a matter of evidence, not inference, and cannot be determined either upon reading of the complaint in the absence of factual statements, by a motion to dismiss raising a conclusion of law, or by judicial knowledge derived from a related case.

Section 2897 of the Civil Code of Guam specifically states that liens take priority in accordance with the time of their creation. The basis of the title of plaintiff Kenneth Dang is upon a judgment sale by order of the District Court of Guam, Civil Case #46-54. The certificate of sale executed by the Marshal was dated the 15th day of August, 1955.

Section 674 of the Code of Civil Procedure of Guam specifically states that the filing of an abstract of judgment of a court of record becomes a lien as of the date of filing.

Section 700 of the Code of Civil Procedure specifically provides that upon the sale of real property, the purchaser acquires all the right, title and interest of the judgment debtor thereto on the date of the levy of execution thereon and if the judgment is a lien upon real property the purchaser acquires all those rights of the judgment as of the day such judgment became a lien on the property. Under the complaint, appellants allege that the claim to title of plaintiff Kenneth Dang is based upon such a sale, said sale being prior in time to any rights of defendant Guam Savings and Loan Association, Inc., or its assignees.

In determining similar cases as to the priority of rights, the Supreme Court of California has had occasion to pass upon similar questions in numerous cases, and has also held that a junior claimant cannot litigate or force the litigation by a superior title of its rights in a foreclosure action. Since the complaint is in essence based upon a claim of superior title, that is a fact which must be determined, appellants contend, after a hearing on evidence and not upon a motion or judicial knowledge. The following cases support these contentions.

> ". . . Adverse titles to the premises held by parties claiming by conveyance from the mortgagor prior to the mortgage, or from third parties prior or subsequent to the mortgage, are not the proper subjects of determination in the suit. Such titles must be settled in a different action, giving rise, as they generally do, to questions of purely legal cognizance. . . ."
>
> *City and County of San Francisco v. Lawton,* 18 C. 465, 79 Am. Dec. 187.

> ". . . Where an adverse title to the mortgaged premises held by parties claiming by conveyance prior to the mortgage, or by title paramount to the title of the mortgagor, is not the proper subject for determination in a suit for foreclosure, the court may refuse to pass upon such title, and the proper course would be to dismiss the action as to the adverse claimant, or to specify in the decree that it is made without prejudice to his adverse rights. . . ."
>
> *Ord v. Bartlett,* 83 C. 428, 23 P. 705.

". . . A decree of foreclosure is in better form when it expressly saves all paramount and hostile rights asserted by a defendant; but the absence of such form is not material, as the decree, no matter what its terms may be, has no effect whatever upon a paramount and adverse title or estate. . . ."

Murray v. Etchepare, 129 C. 318, 61 P. 930.

". . . A decree of foreclosure will not affect the rights of priority of one claiming a title to the land and paramount to that of the mortgagor. . . ."

McComb v. Spangler, 71 C. 418, 12 P. 347.

". . . Where prior encumbrances are made parties, it is only for the purpose of liquidating the amount of their demands, and paying them out of the proceeds of the sale. . . ."

San Francisco v. Lawton, 18 C. 465, 79 Am. Dec. 187.

". . . Persons claiming title adversely to the mortgagor are not proper parties to a foreclosure suit, as they have no interest in the subject matter of the action. . . ."

Croghan v. Minor, 53 C. 15.

". . . In an action to foreclose a mortgage, a person who sets up a claim to the land adverse and paramount to that of the mortgagor and who therefore denies the efficacy of the mortgage as a lien on his own title, cannot properly be joined as a defendant. . . ."

McComb v. Spangler, 71 C. 418, 12 P. 347.

". . . In an action to foreclose a mortgage, a title claimed adversely to the mortgagor cannot be litigated. . . ."

Marlow v. Barlew, 53 C. 456.

". . . A claim adverse and paramount to that of the mortgagor cannot be tried in an action to foreclose a mortgage. . . ."

McComb v. Spangler, 71 C. 418, 12 P. 347.

". . . An adverse title to the mortgaged premises held by parties claiming by conveyance prior to the mortgage or by title paramount to the title of the mortgagor, is not the proper subject of determination in a suit for foreclosure. . . ."

Ord v. Bartlett, 83 C. 428, 23 P. 705.

". . . A title paramount and hostile to the title of the mortgagor and mortgagee cannot be litigated in an action to foreclose the mortgage. . . ."

Cody v. Bean, 93 C. 578, 29 P. 223;

Murray v. Etchepare, 129 C. 318, 61 P. 930;

Cady v. Purser, 131 C. 552, 559, 82 Am.St.Rep. 391, 63 P. 844.

Therefore, appellant contends that the District Court of Guam was in error.

IV.

THE DISTRICT COURT OF GUAM ERRED IN ITS APPLICATION OF THE PRINCIPLES OF JUDICIAL KNOWLEDGE TO THIS CASE AND FURTHER ERRED IF IT WERE TO TAKE SUCH KNOWLEDGE IN FAILING AND REFUSING TO TAKE KNOWLEDGE OF ITS OWN DECISION IN CIVIL CASE NO. 46-54, IN WHICH CASE THE SALE OF THE CENTRAL BUILDING, INC. WAS INVOLVED AND THE SALE WAS CONFIRMED BY ORDER OF THE DISTRICT COURT OF GUAM.

Judicial knowledge has been used in many cases to obviate the necessity of proof. It is not a substitute for contested evidence. Appellant reasons that its application must be in conformity with certain practical rules. One of the common items of judicial knowledge is the capitals of states, the boundaries of counties, national treaties, etc. Those facts are readily available to everyone from standard books of reference; therefore, when a court takes knowledge of such a fact as that Hartford is the capital of the State of Connecticut, the truth of that is readily ascertainable anywhere and thus much needless expense and time of proof are obviated.

However, when a court takes judicial knowledge of such a matter as a case previously tried by said court, that in truth is a matter within the knowledge of said court, but in actual fact, it is also a matter contained within the files of such court and the files of counsel in said case, and checking the accuracy of the court's knowledge is beyond the powers of anyone outside that court. It is this principle of the application of judicial knowledge wherein the District Court of Guam failed. Courts being human can misinterpret or misread even their own notes.

Appellant contends that the District Court of Guam if relying on its knowledge of its own cases, should have taken knowledge of all cases involving any of these parties in which the subject of this action, Central Building, was involved and, secondly, that it was a fundamental error in not making the files of such cases a part of this file.

Appellants believe that this error is apparent and that a similar misapplication of this rule was considered by this court in the following case.

> ". . . As a general rule, a court in one case will not take judicial notice of its own records in another and distinct case even between the same parties, unless the prior proceedings are introduced into evidence. National Surety Co. v. United States, 9 Cir., 29 F.2d 92, 97; Paridy v. Caterpillar Tractor Co., 7 Cir., 48 F.2d 166, 168; Divide Creek Irr. Dist. v. Hollingsworth, 10 Cir., 72 F.2d 859, 862, 863, 96 A.L.R. 937; Funk v. Commissioner of Internal Revenue, 3 Cir., 163 F.2d 796, 800-801; 20 Am. Jr. 105, Evidence, Sect. 87. The rule is not, however, a hard and fast one. The extent to which it will be applied depends in large measure upon considerations of expediency and justice in the circumstances of the particular case. Morse v. Lewis, 4 Cir., 54 F.2d 1027, 1029; Ellis v. Cates, 4 Cir., 178 F.2d 791, 793; 31 C.J.S. Evidence, Sect. 50, pages 623, 624; IX Wigmore on Evidence (3rd Ed.), 570.
>
> "Among the recognized exceptions are instances in which the prior case is brought into the pleadings in the case on trial, Suren v.

Oceanic S.S. Co., 9 Cir., 85 F.2d 324, 325, or where the two cases represent related litigation, Freshmen v. Atkins, 269 U.S. 121, 124, 46 S.Ct. 41, 70 L.Ed. 193; Kitheart v. Metropolitan Life Ins. Co., 8 Cir., 88 F.2d 407, 411; Fletcher v. Vryan, 4 Cir., 175 F.2d 716, 717.

"In the instant case appellant mentioned the prior case in her complaint. In the third cause of action she alleged that 'by virtue of a judgment entered in cause No. 6714, Fairbanks, Alaska, on or about the first day of April, 1952, the Plaintiff, Grace Lowe, individually was awarded a one-half interest in said equipment.' (The Fairbanks drill in controversy.) The allegation was admitted in the answer. During the trial appellant many times discussed case No. 6714, and at one point in addressing the court, referred to the 'transcript' in that action in such a manner as to indicate that she then had the transcript before her. She produced an exhibit in No. 6714, a copy of the Mahan-McDonald mining lease, offered it in evidence in the case on trial, and tried to persuade opposing counsel to renew a stipulation which he had made concerning the exhibit in the former trial. When the court sustained objections to her proffered evidence in support of causes of action three and four on the ground that the issues had been adjudicated in the prior case, she did not question or dispute the court's assumptions or statements as to the nature or effect of the prior proceedings. On the contrary, she moved the court 'to reform that adjudication on the grounds of newly found evidence of title.' The court responded, 'It is too late to do that.' After judgment for defendants had been entered in the

present case, plaintiff, on November 9, 1953, moved in case No. 6714 for modification of the judgment entered therein on April 1, 1952. The court denied the motion on November 19, 1953.

"We think that the present case comes within the exceptions to the general rule, and that, in the circumstances just related, the trial court properly took judicial notice that the rights of the parties in the Fairbanks drill had been fully adjudicated in the prior action."

Lowe v. McDonald, 221 F.2d 228.

Our position is further supported by the holdings of the United States Court of Appeals for the Seventh Circuit.

". . . It is true that a court will take notice of its own records, but it cannot travel for this purpose out of the record relating to the particular case; it cannot take notice of the proceedings in another case, even between the same parties and in the same court, unless such proceedings are put in evidence.

". . . If the courts should recognize judicially facts adjudicated in another case, it makes those facts, though unsupported by evidence in the case in hand, conclusive against the opposing party; while if they had been properly introduced they might have been met and overcome by him. So, on a plea of res judicata, a court cannot judicially notice that the matters in issue are the same as those in a former suit. Such matters must be pleaded and proved. 15 R.C.L. p. 1111, Sect. 42.

". . . The rule provides a most expeditious way of disposing of this issue, i.e., by answer; but

appellee chose rather to present it by motion to dismiss and relied upon the court's judicial knowledge in lieu of evidence, and we think this cannot be done under the facts of this case, for the instant and prior cases cannot be considered the same even though one issue is present in both."

Parkersburg Iron & Steel Co. v. Burnet, 48 F.2d 163.

Therefore, appellants contend that the District Court of Guam erred in its application of the doctrine of judicial knowledge.

V.

DISTRICT COURT OF GUAM WAS IN ERROR IN HOLDING THAT A MORTGAGE MADE SUBSEQUENT TO THE EXECUTION SALE BY ITS OWN ORDER OF THE CENTRAL BUILDING ON THE 22ND DAY OF JULY, 1954 COULD BE SUPERIOR TO TITLE PASSED BY SUCH EXECUTION SALE.

As was shown previously, liens take priority by statute in the order in which they arise. A judgment lien when reduced to sale is but the enforcement of such a lien. The rights arising under a judgment sale relate back as shown previously, to the date of execution. The District Court of Guam disregarded this simple principle of the law of real estate and mortgages and by inference held that by merely naming a superior titleholder as a party defendant that such rights could be forever cut off.

The Supreme Court of the United States as long ago as 1879 clarified this basic principle of law.

"... Priority of lien certainly gave priority of legal right, just as in the case of a first and second mortgage. Either may proceed in the case of mortgage, where the condition is broken, to foreclose; but if the second mortgagee proceeds first, his decree of foreclosure does not supersede or impair the rights of the first mortgage, nor did the proceedings of the plaintiff to enforce the lien of his judgment have any effect whatever to supersede or displace the prior lien under which the defendants claim."

Howard v. Milwaukee and St. Paul R. Co., 101 U.S. 837.

Again in 1926 in the case of *Portneuf Marsh Valley Canal Company v. Brown,* the Supreme Court stated, "Usually liens which are prior in time are prior in equity." 274 U.S. 630.

The Court of Appeals for the Tenth Circuit held in the case of *Whiteside v. Rocky Mountain Fuel Company,* 101 F.2d 765,

"No one except for a valuable consideration and without notice can acquire an interest in property as against valid prior liens."

The Supreme Court of California has had occasion to discuss similar instances as the following cases show.

"... When there are no judgment or attachment liens, the levy of an execution upon real property operates as it does upon personal property; that is, the execution first levied has a priority of lien as between different executions."

Bagley v. Ward, 37 C. 121, 99 Am. Dec. 256.

". . . The sheriff's deed, when executed, takes effect from the time the lien of the judgment attached. . . ."

McMillan v. Richards, 9 C. 365, 70 Am. Dec. 655.

". . . The general rule touching liens is that preference goes with priority. . . ."

Mortgage Securities Co. v. Pfaffmann, 177 C. 109, L.R.A. 1918D, 118, 169 P. 1033.

Thus appellants contend that the results arrived at by the District Court of Guam were error and that in the absence of evidence such a holding could not and cannot be sustained. The court, one believes, is bound by the ancient principle that all allegations of a complaint on a motion to dismiss must be answered as if established for the purpose of the motion.

Now, therefore, can the court have arrived at any such finding? Surely a motion to dismiss unsupported by anything will not sustain such a holding. Therefore, appellants contend that the District Court of Guam was in error.

VI.

THE DISTRICT COURT OF GUAM ERRED IN NOT DIRECTING AN ACCOUNTING OF THE CENTRAL BUILDING.

Appellant contends that the District Court of Guam should have directed an accounting for two reasons. First, that by an accounting the court might have been advised as to the true state of matters in the Central

Building and might have secured information as to the priority of liens and secondly, based upon the principles that the allegations of a complaint must be accepted for the purposes of the action until overcome by the preponderance of evidence that the court should have acted upon such principle and ordered accounting.

VII.

THE DISTRICT COURT OF GUAM ERRED IN NOT DIRECTING AN ACCOUNTING OF THE CHATTELS OF APPELLANTS CONVERTED BY APPELLEES.

This error can be set forth briefly—If the chattels belonged to any of the defendants, appellants would have no claim to them. If they belonged to appellants or either of them, they could not have been the subject of the previous foreclosure action by the Guam Savings and Loan Association, Inc., and Central Building, Inc. Judicial knowledge as to their ownership could not have been taken by the court based upon that case and an accounting would have shown that fact.

VIII.

THE DISTRICT COURT OF GUAM WAS IN ERROR AS TO THE LAWS OF MORTGAGES AND MISAPPLIED THE PERTINENT STATUTES.

As set forth previously, Section 2897 of the Civil Code of Guam clearly specified the priority of liens. Sections 674, 700, 701, 702 and 726(c) of the Code of Civil Procedure of Guam specify the effect of a judgment, the time at which a judgment lien takes effect,

the procedure for redemption, by whom redemption may be made, and also clearly sets forth the effect of failure to redeem. It may be said in passing that the District Court of Guam also misconstrued the provisions of Rules 8(c) and 12(b) of the Federal Rules of Civil Procedure. Basically under the statutes of Guam, a lien holder is first come, first served. Therefore, in effect, if the lien either by the mortgage to Guam Investment Company, Inc. or the lien on the judgment in the Pan American action referred to were prior in time to that of the mortgage held by Guam Savings and Loan Association, Inc., under the statutes, such liens take priority.

If at the time of the making of the mortgage by Guam Savings and Loan Association, Inc. it had or should have had, and in contemplation of law, would be charged with having knowledge express or implied of these liens or rights, they would take priority. These liens or rights, as has been shown previously and set forth in the complaint, cannot be determined by reference to the files of Civil Case #49-55 and would have to be established by evidence. In the instant case, no testimony was taken, no affidavits were filed, no evidence was introduced. The file consists merely of the complaint, the motions to dismiss and the ruling on the motions. The following cases from both federal courts and the Supreme Court of California support this position.

> ". . . The complaint should not be dismissed on motion unless, upon any theory, it appears to a certainty that the plaintiffs would be entitled to

no relief under any state of facts that could be proved in support of his claim. Des Isles v. Evans, 5 Cir., 200 F.2d 614, 615, 616, and authorities there collected."

Lewis v. Brautigam, 227 F.2d 124.

". . . On a motion to dismiss, the averments of the complaint together with all reasonable inferences therefrom must be accepted as true; and all legitimate intendments of the pleader in narrating alleged facts must be resolved in favor of the pleading attacked. . . ."

Pheiffer v. Pennsylvania R. Co., 186 F.2d 558.

". . . The docketing of a judgment imparts constructive notice of the lien of the judgment on the real estate of the judgment debtor to strangers to the judgment. . . ."

Page v. Rogers, 31 C. 293.

". . . In this state a judgment, when docketed, is by statute made a specific lien on all the lands of the judgment debtor, before as well as after levy. . . ."

Hibernia Sav. & Loan Soc. v. London & Lancashire Fire Ins. Co., 138 C. 257, 71 P. 334.

". . . A judgment lien is not a transfer or conveyance of real property, nor does it create a specific lien on the real estate of the judgment debtor; but it is merely a general lien, and is subject to all prior liens, legal or equitable. It merely confers the right to levy thereon to the exclusion of other adverse interests arising subsequently to the judgment. . . ."

Huff v. Sweetser, 8 C.A. 689, 97 P. 705.

". . . Docketing a judgment consists of an entry in the docket in the clerk's office of a brief abstract of the judgment. . . ."

Eby v. Foster, 61 C. 282.

". . . If a person is about to make a loan and take a mortgage upon land as security, and employs an agent, an attorney, to make the negotiation, a declaration made by a tenant in possession of the land to the agent that another person owns an interest in the land, is sufficient to put the mortgage on inquiry, and if due diligence is not exercised in making such inquiry, the mortgage, even if the paper title appears to be in the mortgagor, is subject to the rights of such other person in the land. . . ."

Bauer v. Pierson, 46 C. 293.

". . . One who takes a mortgage upon land, in the sole and exclusive possession of another, can disprove notice of that other's claim only by showing that he made every proper inquiry in respect to the rights of the possessor, and failed to obtain information; but to have such an effect, it must appear that the possession is open and notorious. . . ."

Hellman v. Levy, 55 C. 117.

A further point to be considered is the failure of the court to give consideration to the fundamental principles that a complaint will not be dismissed on motion unless the plaintiff under no condition will be entitled to any relief. Therefore, appellants contend that the District Court of Guam erred in its application and interpretation of law, both of mortgages and judicial

sales in the unincorporated territory of Guam, and should be reversed.

CONCLUSION.

Appellants contend that the District Court of Guam misapplied the statutes and rules, that it erred in holding that the doctrine of res judicata applied in the instant case as disclosed by the files of this case, that the court was in error in holding that all issues between the parties had been previously concluded, that the court failed to appreciate that a claim on superior title could not be litigated in a foreclosure action, that the court was in error in applying the principle of judicial knowledge, and that a mortgage subsequent to an execution sale could be superior to that sale. Therefore, appellants believe that the District Court of Guam should be reversed and the case remanded to the District Court for further proceedings.

Dated, Agana, unincorporated territory of Guam,
10 February, 1959.

Respectfully submitted,

FINTON J. PHELAN, JR.,
JOHN F. ALEXANDER,
Attorneys for Appellants.

No. 16,213

United States Court of Appeals

For the Ninth Circuit

GUAM INVESTMENT COMPANY, INC., et al.,
Appellants,

vs.

CENTRAL BUILDING, INC., et al.,
Appellees.

On Appeal from the District Court of Guam.

BRIEF OF APPELLEES CENTRAL BUILDING, INC., ANTHONY C. LUJAN, ELIZABETH S. LUJAN, JOHN T. MARTINEZ, RAFAELA V. MARTINEZ AND MANUEL U. LUJAN.

JOHN A. BOHN,
ARRIOLA, BOHN & GAYLE,
CHARLES J. WILLIAMS,
640 First Street, Benicia, California,
Attorneys for Appellees Central Building, Inc., Anthony C. Lujan, Elizabeth S. Lujan, John T. Martinez, Rafaela V. Martinez and Manuel U. Lujan.

Subject Index

Table of Authorities Cited

Cases

Special reference is made to companion brief of Appellees Guam Savings and Loan Association and Marianas Finance Co., Inc., filed in Action No. 16213.

Codes

Rules

No. 16,213

United States Court of Appeals
For the Ninth Circuit

GUAM INVESTMENT COMPANY, INC., et al.,
Appellants,

vs.

CENTRAL BUILDING, INC., et al.,
Appellees.

On Appeal from the District Court of Guam.

BRIEF OF APPELLEES CENTRAL BUILDING, INC., ANTHONY C. LUJAN, ELIZABETH S. LUJAN, JOHN T. MARTINEZ, RAFAELA V. MARTINEZ AND MANUEL U. LUJAN.

JURISDICTION.

Jurisdiction of the District Court of Guam is based on U.S.C. Title 48, Sec. 1424, Jurisdiction of this appeal in this Court is based on U.S.C. Title 28, Secs. 1291, 1294.

STATEMENT.

This is an appeal from a judgment of the District Court of Guam sustaining motion of Appellees Central Building, Inc. and its officers and stockholders,

Anthony C. Lujan, Elizabeth S. Lujan, John T. Martinez, Rafaela V. Martinez and Manuel U. Lujan, to dismiss Appellants' complaint on the grounds that said complaint does not state a cause of action against the Appellees and that all of the issues were previously determined by the District Court in Civil Case No. 49-55. (R. pp. 16-17.)

Appellees respectfully refer this Honorable Court to the statement of the case set forth in the brief of Appellees Guam Savings and Loan Association and Marianas Finance Co. Appellees concur with and adopt the statement therein contained.

QUESTIONS PRESENTED.

Appellants have directed their brief to all of the Appellees named in the present action. No distinction is made in any of the arguments as to their applicability to one rather than another Appellee and Appellees herein must conclude that all of the specifications of errors are raised against Appellees herein as well as Appellees Guam Savings and Loan Association and Marianas Finance Co.

Since Appellants are not appealing that portion of the District Court's ruling that they failed to state a cause of action upon which relief can be granted, the questions presented by this appeal as to Appellees herein are identical to those presented as to Appellees Guam Savings and Loan and Marianas Finance, to-wit:

1. Can the affirmative defense of res judicata be raised by a motion to dismiss under the Federal Rules of Civil Procedure?

2. Were all of the issues raised in Appellants' complaint finally settled and adjudicated in Civil Case No. 49-55, the judgment of which was pleaded by Appellees as a bar to this action?

ARGUMENT.

I.

UNDER THE FEDERAL RULES OF CIVIL PROCEDURE, THE AFFIRMATIVE DEFENSE OF RES JUDICATA MAY BE RAISED BY MOTION WHERE ALL OF THE RELEVANT FACTS ARE, AS HERE, SHOWN BY THE COURT'S OWN RECORDS, OF WHICH IT TAKES JUDICIAL NOTICE.

If there is no genuine issue as to a material fact so far as the affirmative defense of res judicata is concerned, it may be raised by motion and the Court may properly pass upon the legal sufficiency of the defense. *346 Bloomfield Avenue Corp. v. Montclair Manufacturing Co.,* D.C. N.J. 1950, 90 F. Supp. 1020.

The District Court had before it all of the records relating to the prior action here relied upon as a bar to the present action. Where all of the relevant facts are thus shown by the Court's own records, it will take judicial notice of them, and in such case there is no reason for first requiring an affirmative pleading. Nothing further could be developed by a trial of the issue. *W. E. Hedger Transp. Corp. v. Ira S. Bushey & Sons,* 186 F. 2d 236 (2nd Cir. 1950); *Florasynth Laboratories Inc. v. Goldberg,* 191 F. 2d 877 (7th

Cir. 1951); *Larter & Sons v. Dinkler Hotels Co.,* 191 F. 2d 877 (5th Cir. 1952).

II.

THE ISSUES RAISED IN THIS ACTION WERE FINALLY SETTLED AND ADJUDICATED IN CIVIL CASE 49-55 AND JUDGMENT RENDERED THEREIN IS RES JUDICATA.

With the exception of the individual Appellees named in their capacity as officers and stockholders of Central Building, all of the parties to this action are the same as those in Civil Case 49-55, District Court of Guam. The identification in interest of these individuals with Central Building is such as to make them privies to the prior action. 50 C.J.S. 331.

The rights of the parties, the facts upon which the rights were predicated, the matter in issue, namely Appellee Savings and Loan's Title, all of these were directly adjudicated upon and necessarily involved in the prior action. Although Appellants defaulted, the jurisdiction of the District Court is conceded and the judgment nevertheless bars a subsequent suit on the same subject matter. 34 C.J.S. 743, 50 C.J.S. 57.

The basis upon which Appellants seek to avoid the doctrine of res judicata is their assertion of superior title. Since priority was actually determined in the prior action, this rule is not applicable. *Dobbins v. Economic Gas Co.* (1920), 182 Cal. 616, 189 Pac. 1073.

Appellees respectfully refer the Court to the brief of Appellants Guam Savings and Loan and Marianas

Finance, pp. 17 et seq. for authority and reasoning as to this conclusion.

Appellants assert no other reason for the non-applicability of res judicata as to Appellees herein.

CONCLUSION.

For the foregoing reasons, it is submitted that the judgment of the District Court should be affirmed.

Dated, June 23, 1959.

Respectfully submitted,

JOHN A. BOHN,
ARRIOLA, BOHN & GAYLE,
BY CHARLES J. WILLIAMS,
Attorneys for Appellees Central Building, Inc., Anthony C. Lujan, Elizabeth S. Lujan, John T. Martinez, Rafaela V. Martinez and Manuel U. Lujan.

No. 16214

United States
Court of Appeals
for the Ninth Circuit

RICHARD WILLIAM BOYD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California Central Division

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—12-5-58

No. 16214

United States
Court of Appeals
for the Ninth Circuit

RICHARD WILLIAM BOYD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California Central Division

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—12-5-58

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

BIRNBAUM & HEMMERLING,
CLIFFORD A. HEMMERLING,
433 So. Spring Street,
Los Angeles 13, California.

For Appellee:

LAUGHLIN E. WATERS,
United States Attorney;

ROBERT D. HORNBAKER,
Assistant U. S. Attorney,
600 Federal Building,
Los Angeles 12, California.

United States District Court for the Southern District of California, Central Division

No. 26784—CD

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RICHARD WILLIAM BOYD,

Defendant.

INDICTMENT

[U.S.C., Title 50, App., Sec. 462—Universal Military Training and Service Act]

The grand jury charges:

Defendant Richard William Boyd, a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said Act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 113, said Board being then and there duly created and acting, under the Selective Service System established by said Act, in Los Angeles County, California, in the Central Division of the Southern District of California; pursuant to said Act and the regulations promulgated thereunder, the defendant was classified in Class I-A and was notified of said classification and a notice and order by said Board was duly given to him to report for induction into the armed forces of the United States of America on February 28, 1958, in Los Angeles County, Cali-

fornia, in the division and district aforesaid; and on or about March 3, 1958, and at said place the defendant knowingly failed and neglected to perform [2] a duty required of him under said Act and the regulations promulgated thereunder in that he knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do.

A True Bill.

/s/ NATHAN SAFIER,
Deputy Foreman.

/s/ LAUGHLIN E. WATERS,
United States Attorney.

Bond fixed in the amount of .....

[Endorsed]: Filed April 30, 1958. [3*]

[Title of District Court and Cause.]

MINUTES OF THE COURT, AUGUST 11, 1958

Present: Hon. Dave Ling, District Judge.
U. S. Att'y, by Assistant U. S. Att'y: No appearance.
Counsel for Defendant: No appearance.
Defendant not present.

Proceedings: In Chambers. (Special Calendar.)

It Is Ordered that defendant's motion for judgment of acquittal is denied.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

Court Finds defendant guilty as charged in the Indictment and orders cause continued to 10:00 a.m., Aug. 25, 1958, for imposition of sentence.

Counsel notified.

JOHN A. CHILDRESS,
Clerk;

By /s/ IRWIN YOUNG,
Deputy Clerk. [4]

[Title of District Court and Cause.]

MINUTES OF THE COURT, AUGUST 25, 1958

Present: Hon. Dave W. Ling, District Judge.
U. S. Att'y, by Assistant U. S. Att'y: Thos. R. Sheridan, Esq.
Counsel for Defendant: Clifford A. Hemmerling, Esq.
Defendant present (on bond).

Proceedings: Sentence:

It Is Ordered that defendant be committed to the custody of the Attorney General for a period of one (1) year.

It Is Further Ordered that execution of said sentence be stayed for 10 days and that defendant be allowed to remain on bond during that time.

It Is Further Ordered that defendant's motion for new trial be and hereby is denied.

JOHN A. CHILDRESS,
Clerk;

By /s/ IRWIN YOUNG,
Deputy Clerk. [5]

United States District Court for the Southern District of California, Central Division

No. 26,784—Criminal

UNITED STATES OF AMERICA,

vs.

RICHARD WILLIAM BOYD.

JUDGMENT AND COMMITMENT

On this 25th day of August, 1958, came the attorney for the government and the defendant appeared in person and counsel, Clifford A. Hemmerling:

It Is Adjudged that the defendant has been convicted upon his plea of not guilty of the offense of failing and refusing to be inducted into the armed forces of the United States in violation of U.S.C., Title 50, App., Sec. 462—Universal Military Training and Service Act, as charged in the indictment; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause

to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one (1) year.

It Is Adjudged that, upon motion of counsel for the defendant, a stay of execution for a period of ten (10) days be, and hereby is, granted.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

[Seal] /s/ DAVE W. LING,
United States District Judge.

[Endorsed]: Filed August 25, 1958. [6]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Richard William Boyd, Defendant and Appellant, alleges:

1. The title of this case is "United States of America, Plaintiff, vs. Richard William Boyd, Defendant."

2. Appellant's address is 1271 South Barrington Avenue, West Los Angeles 25, California.

3. The address of Appellant's attorney, Clifford A. Hemmerling, is 433 South Spring Street, Los Angeles 13, California.

4. Appellant was indicted for allegedly violating U.S.C., Title 50, App., Sec. 562, Universal Military Training Service Act, in that he failed and refused to be inducted into the armed forces of the United States.

5. Appellant was found guilty of the charge specified in the indictment and a one-year sentence was imposed. The judgment date is August 25, 1958, and it was entered on August 26, 1958. [7]

6. Appellant appeals from said judgment. He is currently out on bail.

Dated: September 2, 1958.

BIRNBAUM & HEMMERLING,

By /s/ CLIFFORD A. HEMMERLING,
Attorneys for Defendant-
Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 2, 1958. [8]

[Title of District Court and Cause.]

STIPULATION RE: TESTIMONY AT TRIAL

It Is Stipulated by and between the Parties hereto as follows:

1. The only evidence at the trial consisted of the introduction into evidence of the Defendant's Selective Service File by the Plaintiff without objection by the Defendant.

2. At the conclusion of the Plaintiff's case, the Defendant moved for a judgment of acquittal on the grounds that (i) the Defendant was denied due process of law in that he was not reclassified after his classification was reopened; (ii) that if Defendant's classification was not reopened by the draft board, its refusal to do so was improper and illegal; (iii) the draft board's purported refusal to reopen as stated in its letter of February 12, 1958, and its previous proceedings were [12] based upon the erroneous theory that Defendant was entitled to be classified as a conscientious objector only if he were a pioneer. This motion was denied. (iv) The other grounds set forth in Defendant's Statement of Points to Be Relied Upon on Appeal; and (V) Selective Service Regulations Section 1625-2 is void and unconstitutional. This motion was denied.

3. Defendant's Motion for a New Trial was based on all of the grounds stated in Paragraph 2 hereof. This motion was denied.

4. This stipulation may be used instead of a reporter's transcript in Defendant's appeal.

Dated: September 29, 1958.

BIRNBAUM & HEMMERLING,

By /s/ CLIFFORD A. HEMMERLING,
Attorneys for Appellant-Defendant.

/s/ ROBERT D. HORNBAKER,
Assistant United States Attorney, Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed September 30, 1958. [13]

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled matter:

A. The foregoing pages numbered 1 to 16, inclusive, containing the original:

Indictment.
Minute Order of 8/11/58.
Minute Order of 8/25/58.
Judgment.

Notice of Appeal.

Designation of Contents of Record on Appeal.

Stipulation re: Testimony at Trial.

Statement of Points to Be Relied Upon on Appeal.

B. Plaintiff's Exhibit 1 (Selective Service File).

I further certify that my fee for preparing the foregoing record, amounting to $1.60, has been paid by appellant.

Dated: October 3, 1958.

[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 16214. United States Court of Appeals for the Ninth Circuit. Richard William Boyd, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: October 4, 1958.

Docketed: October 9, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit
Case No. 16214

RICHARD WILLIAM BOYD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON APPEAL—RULE 17 (6)

Defendant-Appellant intends to rely upon the points urged before the District Court and will contend that the District Court erred in the following respects:

1. The evidence is insufficient to support the judgment.

2. In failing to grant Defendant's Motion for a Judgment of Acquittal.

3. In failing to grant Defendant's Motion for a New Trial.

4. In failing to acquit the Defendant on the ground that Selective Service Regulations Sections 1625.11 and 1625.12 were not complied with in that Defendant was not reclassified after his classification was reopened on and between December 10, 1957, to February 12, 1958.

5. In failing to find that that portion of the Selective Service Regulations Section 1625.2 reading as follows:

> "* * * provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

is void insofar as applied to Defendant and conscientious objectors as contrary to the Universal Military Training and Service Act which requires the exemption of conscientious objectors without regard to when an Order to Report for Induction is made.

6. In failing to find that the Defendant's classification should have been reopened on and between December 10, 1957, to February 12, 1958, if, in fact, it was not reopened by the draft board.

7. In failing to find that the draft board's alleged refusal to reopen and reclassify Defendant and his classification was based upon the erroneous theory that the Defendant could be classified as a conscientious objector only if he were a Pioneer.

Dated: October 17, 1958.

BIRNBAUM & HEMMERLING,

By /s/ CLIFFORD A. HEMMERLING,

Attorneys for Defendant and Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 18, 1958.

No. 16214

United States Court of Appeals

FOR THE NINTH CIRCUIT

RICHARD WILLIAM BOYD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

Appeal from the United States District Court for the Southern District of California, Central Division.

HAYDEN C. COVINGTON
124 Columbia Heights
Brooklyn 1, New York

BIRNBAUM & HEMMERLING
CLIFFORD A. HEMMERLING
433 South Spring Street
Los Angeles 13, California

Counsel for Appellant

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Cases Cited

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No. 16214

United States Court of Appeals

FOR THE NINTH CIRCUIT

RICHARD WILLIAM BOYD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

Appeal from the United States District Court for the Southern District of California, Central Division.

JURISDICTION

This is an appeal from a judgment of conviction rendered and entered by the United States District Court for the Southern District of California, Central Division. [R. 6-7][1] The District Court had jurisdiction under Title 18, § 3231, U. S. C. A. The indictment charged an offense against the Universal Military Training and Service Act

[1] Numbers appearing herein within brackets preceded by "R." refer to pages of the printed transcript of record filed herein.

(50 U. S. C. A. App. § 462). [R. 3-4] This Court has jurisdiction of this appeal under Rule 37 (a) (1) and (3) of the Federal Rules of Criminal Procedure because the notice of appeal was filed in the time and manner required by law. [R. 7-8]

STATUTE INVOLVED

Section 12 (a) of the Act (50 U. S. C. A. App. § 462 (a)) provides:

> . . . Any . . . person . . . who . . . refuses . . . service in the armed forces . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title . . . shall upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . .

REGULATIONS INVOLVED

The Regulations involved are 32 C.F.R. § 1625.1 to § 1625.4 and 32 C.F.R. § 1625.11 to § 1625.14.

> 1625.1 Classification Not Permanent.—(a) No classification is permanent.
>
> (b) Each classified registrant and each person who has filed a request for the registrant's deferment shall, within 10 days after it occurs, report to the local board in writing any fact that might result in the registrant being placed in a different classification such as, but not limited to, any change in his occupational, marital, military, or dependency status, or in his physical condition. Any other person should report to the local board in writing any such fact within 10 days after having knowledge thereof.

(c) The local board shall keep informed of the status of classified registrants. Registrants may be questioned or physically or mentally re-examined, employers may be required to furnish information, police officials or other agencies may be requested to make investigations, and other steps may be taken by the local board to keep currently informed concerning the status of classified registrants.—32 C.F.R. § 1625.1.

1625.2 When Registrant's Classification May Be Reopened and Considered Anew.—The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control. —32 C.F.R. § 1625.2.

1625.3 When Registrant's Classification Shall Be Reopened and Considered Anew.—(a) The local board shall reopen and consider anew the classification of a registrant upon the written request of the State Director of Selective Service or the Director of Selective

Service and upon receipt of such request shall immediately cancel any Order to Report for Induction (SSS Form No. 252) which may have been issued to the registrant.

(b) The local board shall reopen and consider anew the classification of a registrant to whom it has mailed an Order to Report for Induction (SSS Form No. 252) whenever facts are presented to the local board which establish the registrant's eligibility for classification into Class I-S because he is satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning.—32 C.F.R. § 1625.3.

1625.4 Refusal to Reopen and Consider Anew Registrant's Classification.—When a registrant, any person who claims to be a dependent of a registrant, any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, or the government appeal agent files with the local board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification. In such a case, the local board, by letter, shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification and shall place a copy of the letter in the registrant's file. No other record of the receipt of such a request and the action taken thereon is required.—32 C.F.R. § 1625.4.

1625.11 Classification Considered Anew When Reopened.—When the local board reopens the registrant's

classification, it shall consider the new information which it has received and shall again classify the registrant in the same manner as if he had never before been classified. Such classification shall be and have the effect of a new and original classification even though the registrant is again placed in the class that he was in before his classification was reopened.—32 C.F.R. § 1625.11

1625.12 Notice of Action When Classification Considered Anew.—When the local board reopens the registrant's classification, it shall, as soon as practicable after it has again classified the registrant, mail notice thereof on Notice of Classification (SSS Form No. 110) to the registrant and on Classification Advice (SSS Form No. 111) to the persons entitled to receive such notice or advice on an original classification under the provisions of section 1623.4 of this chapter.—32 C.F.R. § 1625.12.

1625.13 Right of Appeal Following Reopening of Classification.—Each such classification shall be followed by the same right of appearance before the local board and the same right of appeal as in the case of an original classification.—32 C.F.R. § 1625.13.

1625.14 Order to Report for Induction to Be Canceled When Classification Reopened.—When the local board has reopened the classification of a registrant, it shall cancel any Order to Report for Induction (SSS Form No. 252) which may have been issued to the registrant. If, after the registrant's classification is reopened, he is classified anew into a class available for service, he shall be ordered to report for induction in the usual manner.—32 C.F.R. § 1625.14.

STATEMENT OF THE CASE

Appellant was charged by indictment alleging that he refused to be inducted into the armed forces of the United States on March 3, 1958. [R. 3-4] He pleaded not guilty and waived the right of trial by jury. He was tried and thereafter, on August 25, 1958, he was found guilty. [R. 5] Upon the trial of the case the only evidence received was appellant's Selective Service file. [R. 9-10] The pertinent parts of that file shall now be summarized.

Appellant Boyd registered on January 22, 1953. (F. 1-2)[2] On March 9, 1953, he filed the Selective Service questionnaire provided by the local board. (F. 5) Since he was not too "strong in the faith" at the time, he did not fill out Series XIV concerning conscientious objection to war. (F. 11, 49) On August 5, 1953, he was classified in I-A and was so notified on August 6, 1953. (F. 12)

The local board wrote several letters to the appellant after he failed to report for an armed forces physical examination, all of which were returned marked "unknown," "wrong address" or "left no address." (F. 12, 17, 21, 22-23, 25, 26-28, 32-33)

The order to report for induction dated September 24, 1957, commanding appellant to report on October 25, 1957 (F. 12, 34), was also returned to the local board by the post office marked "unknown." (F. 12, 38-39) On October 29, 1957, the local board received information from the induction station that the appellant had failed to report. (F. 12) A delinquent registrant report was thereupon sent to the United States Attorney. (F. 40-41)

On December 10, 1957, the appellant came to the local board office and provided his address. He was handed a dependency questionnaire which he thereupon filled out

[2] Numbers preceded by "F." appearing in parenthesis herein refer to the pages from the Selective Service file introduced into evidence by the Government. Such page numbers, written in longhand, appear at the bottom of each page of the file.

and filed. (F. 43-47) Upon his request he was issued a special form for conscientious objector with instructions to file it by December 15, 1957. (F. 12, 50) He stated to the board that the reason he had not certified that he was a conscientious objector was because he was "not as strong in my faith until recently" and "didn't know too much about it, that is, about sending in for forms." (F. 49)

On December 16, 1957, the special form for conscientious objector was filed. (F. 12, 50) It showed that appellant was conscientiously opposed to his participation in both combatant and noncombatant military service. (F. 50-55)

On January 6, 1958, the United States Attorney notified the local board that "it is agreeable with this office for you to act again in this case." (F. 56) On January 10, 1958, the United States Attorney informed the local board that it could "remove the above name [Richard William Boyd] from your Form 302," which is the record of delinquents maintained at the local board. (F. 57) He added that he was "in favor of immediate induction as a delinquent" of the appellant. (F. 57)

On February 12, 1958, the local board informed appellant that the information filed by him, including the special form for conscientious objector, had been considered by the local board and it was "of the opinion that the facts presented do not warrant the reopening or reclassification" of appellant's case. (F. 12, 62) The local board thereupon ordered appellant to report for induction, by sending to him a copy of the order dated September 24, 1957, to report for induction October 25, 1957, and stated that, in view of his delinquent status, he was required to report on February 28, 1958, for induction. (F. 13, 63) Appellant reported for, but declined to submit to, induction on February 28, 1958. (F. 13, 64)

The local board then sent to the State Director on March 6, 1958, the Selective Service file for attention and, among other things, said: "In view of the fact that the registrant has filed SS Form 150 claiming Conscientious Objection,

it would be appreciated if you review this case with reference to Local Board Memorandum No. 14." (F. 13, 85-86) The local board, on March 7, 1958, again wrote to the State Director for clarification in view of the appellant's having filed the special form for conscientious objector. (F. 88) The Director of Selective Service determined that appellant should be prosecuted. (F. 89-90) A delinquent registrant report was thereupon sent to the United States Attorney by the local board on April 4, 1958. (F. 13, 91-92)

QUESTION PRESENTED AND HOW RAISED

The only question raised upon this appeal is whether the local board violated appellant's rights to procedural due process of law by failing to reconsider appellant's case *de novo,* reclassify him as though he had not theretofore been classified and mail to him a notice of classification following the issuance to him by the local board and his filing of the special form for conscientious objector, as required by Selective Service Regulations, Part 1625, all of which denied him his rights to a personal appearance and to an appeal to the appeal board.

SPECIFICATION OF ERROR

The District Court erred in failing to grant the motion for judgment of acquittal duly made at the close of the Government's case and renewed at the close of all the evidence. (R. 4, 9)

The appellant also complained of the action of the trial court in overruling the motion for judgment of acquittal in a motion for new trial duly filed. (R. 9-10)

ARGUMENT

The argument will be brief. The issuance to the appellant of the special form for conscientious objector after the order to report for induction was issued constituted a reopening of the classification. (*United States* v. *Underwood,* 151 F. Supp. 874 (E.D. Pa. 1955)). See also *United States* v. *Vincelli,* 215 F. 2d 210, 216 F. 2d 681 (2d Cir. 1954); *United States* v. *Packer,* 200 F. 2d 540 (2d Cir. 1952; reversed on other grounds, 346 U. S. 1, 1953); *Olvera* v. *United States,* 223 F. 2d 880 (5th Cir. 1955).

The issuance of the special form for conscientious objector does constitute a reopening of the case according to the holding of this Court.—*Knox* v. *United States,* 200 F. 2d 398 (9th Cir. 1952).

It was the duty of the local board to cancel the order to report for induction because the issuance of the special form for conscientious objector constituted a reopening of the case.—*Knox* v. *United States,* 200 F. 2d 398 (9th Cir. 1952); *United States* v. *Vincelli,* 215 F. 2d 210, 216 F. 2d 681 (2d Cir. 1954); *United States* v. *Underwood,* 151 F. Supp. 874 (E.D. Pa. 1955).

The Selective Service Regulations (32 C. F. R. § 1625.14) provide: "When the local board has reopened the classification of a registrant, it shall cancel any Order to Report for Induction (SSS Form No. 252) which may have been issued to the registrant. If, after the registrant's classification is reopened, he is classified anew into a class available for service, he shall be ordered to report for induction in the usual manner."

The order to report issued September 24, 1957, which was returned to the local board before the date commanding appellant to report on October 25, 1957, was made invalid and constituted no basis upon which the appellant could be thereafter ordered to report for induction as commanded in the letter of February 12, 1958, ordering him to report on February 28, 1958. (F. 40, 63)

The issuance of the special form for conscientious objector constituted a reopening (*United States* v. *Vincelli, supra; United States* v. *Underwood, supra*) so as to require the local board to cancel the order to report for induction and reprocess the appellant by notifying him of the classification, as required by Section 1625.12 of the Regulations. The appellant was denied his rights to a personal appearance pursuant to Section 1624.1 of the Regulations and his right to an appeal guaranteed by Section 1625.13 of the Regulations when he was treated as a delinquent upon failure to report for induction after his classification had been reopened by reason of the issuance of the special form for conscientious objector, pursuant to *United States* v. *Vincelli,* 215 F. 2d 210, 216 F. 2d 681 (2d Cir. 1954), and *United States* v. *Underwood,* 151 F. Supp. 874 (E.D. Pa. 1955).

It is submitted that the appellant was denied procedural due process of law through the failure of the local board to cancel the order to report for induction, formally reopen his classification and notify him of the new classification, so that he would have the rights to a personal appearance and appeal as guaranteed by the Regulations.

CONCLUSION

WHEREFORE, for the reasons above stated, the judgment of the court below should be reversed and it should be ordered that the motion for judgment of acquittal be sustained.

Respectfully submitted,

HAYDEN C. COVINGTON

124 Columbia Heights
Brooklyn 1, New York

BIRNBAUM & HEMMERLING
CLIFFORD A. HEMMERLING

433 South Spring Street
Los Angeles 13, California

Counsel for Appellant

February, 1959.

No. 16214

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RICHARD WILLIAM BOYD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

LAUGHLIN E. WATERS,
United States Attorney,
ROBERT JOHN JENSEN,
Assistant U. S. Attorney,
Chief, Criminal Division,
ROBERT D. HORNBAKER,
Assistant U. S. Attorney,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee United States of America.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 16214

IN THE

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RICHARD WILLIAM BOYD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

Statement of Jurisdiction.

Appellant was found guilty on August 11, 1958 after a court trial before the Honorable Dave Ling in the United States District Court for the Southern District of California, Central Division, of knowingly failing and refusing to be inducted into the armed forces of the United States in violation of Section 462, Title 50 Appendix, United States Code [Tr. 4-5].[1] Appellant was sentenced on August 25, 1958 to the custody of the Attorney General for a period of one (1) year [Tr. 5-7]. The District Court had jurisdiction under Section 3231, Title 18, United States Code. Appellant filed notice of appeal on September 2, 1958 in the manner prescribed by

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[1]Refers to the page numbers of the Transcript of the Record.

law [Tr. 7-8]. This Court has jurisdiction under Section 1291, Title 28, United States Code, and Rules 37 and 39 of the Federal Rules of Criminal Procedure.

Statement of the Case.

January 22, 1953. Defendant registered with Local Board No. 113 in Alhambra, California, giving his place of residence as 2638 North Mountain View Road, El Monte, California, and stating that Mr. Robert Boyd, 1271½ South Barrington Ave., W. Los Angeles, Calif., was a person who would always know his address [SSF 2].[2]

March 9, 1953. Defendant returned his Classification Questionnaire to the Local Board, stating that he was not a minister and did not claim to be a conscientious objector [SSF 5-11].

June 17, 1953. Defendant advised Local Board of change in address to 1436½ Butler Ave., West Los Angeles 25, Calif. [SSF 3].

August 5, 1953. Local Board classified defendant 1-A [SSF 3, 12].

April 23, 1957. Defendant ordered to report for Preinduction Physical Examination. Order was sent to defendant's last known address, 1436½ Butler Ave., West Los Angeles 25, Calif. [SSF 17].

May 1, 1957. Order was returned to Local Board marked "unknown at address" [SSF 20]. Local Board sent letters to Mr. Robert Boyd, 1271½ South Barrington Ave., West Los Angeles, Calif., to the Occupant, 2638 North Mountain View Road., El Monte, Calif., and to the

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[2]Refers to penciled numbers at bottom of each page of defendant's Selective Service File, Government Exhibit 1.

Occupant, 1436½ Butler Ave., West Los Angeles, Calif. The letters asked for information on defendant's whereabouts [SSF 21-3].

May 3, 1957. Letter to Mr. Robert Boyd returned marked "unknown at address" [SSF 25].

May 7, 1957. Letter to Occupant, 2638 North Mountain View Road, returned marked "Left no address." [SSF 26].

May 22, 1957. Letter to Occupant, 1436½ Butler Ave., West Los Angeles 25, Calif., returned with notation: "I know of no one by that name [Boyd, Richard William]. I bo't this place about a year ago from a Mrs. Page. I have asked some of the neighbors, but they don't know him either. Almeda R. Allen."

September 5, 1957. Notice sent to defendant at his last known address, 1436½ Butler Ave., West Los Angeles 25, Calif., telling him that he had been declared delinquent for (1) failing to notify the Local Board of change in address and (2) failing to report for Preinduction Physical Examination [SSF 30].

September 10, 1957. Delinquency Notice returned to Local Board marked "unknown at number" [SSF 32].

September 24, 1957. Local Board ordered defendant to report for induction on October 25, 1957. The order was sent to defendant's last known address, 1436½ Butler Ave., West Los Angeles 25, Calif. [SSF 34-5].

October 1, 1957. Order returned to Local Board marked "unknown at address" [SSF 38-9].

October 25, 1957. Defendant failed to report.

November 7, 1957. Local Board advised United States Attorney that defendant was delinquent for failure to report for induction [SSF 40-1].

December 10, 1957. Defendant notified Local Board of change in address to 1271½ S. Barrington Ave., West Los Angeles 25, Calif. [SSF 42].

December 10, 1957. Defendant mentioned his conscientious objections *for the first time.* Said he, in a letter to the Local Board: "I would like to request an application for conscientious objector" [SSF 47]. The reason he had not made an application before, he said, was because "I was not as strong in my faith until recently" [SSF 49].

December 10, 1957. Local Board issued defendant a Special Form for Conscientious Objectors [SSF 50-5].

December 16, 1957. Defendant returned the Special Form for Conscientious Objectors [SSF 12].

January 6, 1958. United States Attorney wrote to the Local Board saying: "Since we are advised by the FBI that the above delinquent registrant has been located and is in contact with his local board, it is agreeable with this office for you to act again in this case" [SSF 56].

January 10, 1958. United States Attorney declined prosecution for reason that "Subject in favor of immediate induction as a delinquent" [SSF 57].

January 17, 1958. Local Board asked defendant for a statement as to whether he was considered a Pioneer by the Watchtower Bible and Tract Society [SSF 61].

January 20, 1958. Defendant replied that he was not a Pioneer but was a Congregational Publisher working toward becoming a Pioneer [SSF 58].

February 12, 1958. Local Board notified defendant that the "facts presented do not warrant the reopening or reclassification of your case at this time" [SSF 62].

February 12, 1958. Defendant ordered to report for induction on February 28, 1958 [SSF 63].

February 28, 1958. Defendant reported [SSF 87].

March 3, 1958. Defendant refused to submit to induction by taking "one step forward" [SSF 64-5, 91-2].

March 6, 1958. Local Board sent defendant's cover sheet to State Director, saying: "In view of the fact that the registrant has filed SS Form 150 [Special Form for Conscientious Objectors] claiming conscientious objection, it would be appreciated if you review the case with reference to Local Board Memorandum No. 14" [SSF 85-6].

March 7, 1958. Local Board sent supplementary letter to State Director [SSF 88].

March 26, 1958. State Director told Local Board that defendant should be reported to United States Attorney for prosecution [SSF 90].

April 4, 1958. Local Board reported defendant to United States Attorney for prosecution [SSF 91-2].

I.

Defendant Waived His Conscientious Objector Claim or Was Estopped to Assert It.

Deferment as a conscientious objector is a privilege which may be waived or abandoned like any other privilege. Said the Court in *United States v. Schoebel,* 201 F. 2d 31, 32 (7 Cir., 1953):

> "The burden is upon a registrant to establish his eligibility for deferment or exemption to the satisfaction of the local board, and to file a timely claim therefor. Deferment being a privilege, it may be abandoned by the holder like any other personal privilege. United States v. Rubinstein, 2 Cir., 166 F. 2d 249, 258, certiorari denied 333 U. S. 868, 68 S. Ct. 791, 92 L. Ed. 1146."

In the Special Form for Conscientious Objectors defendant stated that "since 1949 I have associated myself with them [Jehovah's Witnesses]" [SSF 53]. Yet, he did not tell the Local Board that he might claim conscientious objector status until December 10, 1957, almost two months after he had been ordered to report for induction. He then wrote the local board saying: "I would like to request an application for a conscientious objector" [SSF 47]. His only reason for delay was because he "was not as strong in [his] faith until recently" [SSF 49].

The Government takes the position that the defendant's failure to make a conscientious objector claim until after he was ordered to report for induction amounted to an abandonment of such claim or estopped him from asserting it.

Section 15(b) of the Selective Service and Training Act, Section 465(b), Title 50 Appendix, United States Code, states that "it shall be the duty of every registrant to keep his local board informed as to his current address." Defendant's failure to do so for over seven months, from May 1, 1957 to December 10, 1957, was a crime in itself. *Stumpf v. Sanford,* 145 F. 2d 270 (5 Cir., 1944).

The Government contends that defendant's crime of failing to inform his Local Board of his current address also constituted an abandonment of his claim or estopped him from asserting it. After all, had it not been for such crime the defendant would have been inducted on October 25, 1957, a full six weeks before he became strong enough in his faith to make a claim for deferment.

After the defendant returned the Special Form for Conscientious Objectors to the Local Board, he advised the United States Attorney that he was "in favor of

immediate induction" and prosecution was declined [SSF 12, 50-5, 57]. Defendant was again ordered to report [SSF 63]. Defendant reported but refused to be inducted [SSF 64-5].

The Government urges that defendant's representation to the United States Attorney that he was in favor of immediate induction was another instance of his waiver or abandonment of his claim for deferment.

II.

The Local Board Did Not Deny Defendant Procedural Due Process in Refusing to Reopen and Reclassify.

Assuming that defendant did not waive his claim and was not estopped to assert it, he was still not denied procedural due process. Section 1625.2 of the Selective Service Regulations,, 32 C. F. R. Section 1625.2, provides that:

> "The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant . . . if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; provided in either event, *the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252) . . . unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.*" (Emphasis supplied.)

Section 1625.4 of the Selective Service Regulations, 32 C. F. R. Section 1625.4, further provides that:

> "When a registrant . . . files with the local board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it should not reopen the registrant's classification. In such a case, the local board, by letter, shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification and shall place a copy of the letter in the registrant's file. No other record of the receipt of such a request and the action taken thereon is required."

These two sections make it clear that:

(1) The local board "may" reopen a registrant's classification.

(2) A classification shall not be reopened after the local board has mailed an Order to Report for Induction unless there has been a change in registrant's status resulting from circumstances over which he has no control.

(3) The local board may consider information in deciding whether or not to reopen but this consideration alone is not a reopening.

In this case, the defendant did not request a conscientious objector form until after he had been ordered to report for induction [SSF 49].

Also, he did not fill out and return the Special Form for Conscientious Objectors until after he had been ordered to report [SSF 50-5].

Furthermore, the Local Board's inquiry as to whether defendant was a Pioneer and his reply thereto were not made until after defendant had been ordered to report [SSF 58, 61].

In short, the local board could not have reopened unless defendant showed a change in status over which he had no control. The strengthening of one's faith and the acquisition of conscientious objections, however, does not constitute such a change in status. The case in point is *United States v. Schoebel,* 201 F. 2d 31 (7 Cir., 1953). In that case the defendant was ordered on May 1, 1951 to report for induction on May 14. On May 8—for the first time—defendant claimed to be a conscientious objector. The local board considered the claim but refused to reopen. Defendant refused to be inducted and was convicted. In affirming, the court said:

> "Defendant quotes Sec. 1625.2 of the Selective Service Regulations which provides that a local board may reopen the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, or a person who claims to be a dependent, or (2) upon its own motion. However, in both instances the regulation provides, '* * * provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically, finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.' On oral argument before this court defendant's counsel suggested that conscientious objections resulting from

> the promptings of a registrant's conscience would be a change in status over which the registrant had no control. We cannot acquiesce in such a strained interpretation of the regulation. There was no other claim of a change in status. The board did not find any change in defendant's status, and therefore in failing to reopen defendant's classification it did not exceed its powers or acts in an arbitrary manner."

After the defendant returned the Special Form for Conscientious Objectors to the Local Board, they wrote the defendant, in accordance with the regulations, that the "facts presented do not warrant the reopening or reclassification of your case at this time" [SSF 62].

Paradoxically, the defendant now claims that the Local Board did what they said they were not doing and what the regulations said they could no do!

One case in the Southern District of California, *United States v. Monroe,* 150 Fed. Supp. 785, 789 (S. D. Cal., 1957), is directly in point. The facts there were as follows:

January 21, 1952. Defendant Monroe registered with Local Board No. 86 in Burbank.

April 20, 1954. The Local Board classified defendant 1-A.

Latter part of 1955. Defendant became associated with Jehovah's Witnesses but failed to notify the draft board until the events hereinafter related.

July 17, 1956. The Local Board, unaware of the defendant's newly acquired convictions, mailed an Order to Report for Induction on August 1, 1956. At that time, registrant's file was barren of any suggestion that he claimed to be a conscientious objector.

July 30, 1956. Registrant appeared at the Local Board and orally requested a Special Form for Conscientious Objectors, SSS Form 150. He did not then request a reopening nor claim an exemption from military service but merely indicated that he would return the form the following morning. At the time registrant procured the form he had not decided to request deferment as a conscientious objector, but intended to take more time to make up his mind whether he "was doing the right thing."

August 3, 1956. Local Board informed by Induction Station that defendant had appeared on August 1 but had refused to be inducted. Board also received a formal declaration (mailed on July 31st) that the registrant claimed to be a conscientious objector and would refuse to be inducted.

August 6, 1956. Special Form for Conscientious Objector received by the Local Board.

Judge Tolin's well-written opinion merits extensive quotation here. Said the Judge:

> "Unless the board's failure to reopen and consider anew registrant's classification constituted a denial of due process, registrant is guilty as charged. A valid order to report for induction imposed upon Monroe a duty to submit to induction, and his knowing refusal to perform that duty was a violation of the Universal Military Training and Service Act, 50 U. S. C. A. Appendix, § 462(a).
>
> "In evaluating Monroe's claim in this prosecution that the board's failure to reopen was so arbitrary and capricious as to make illegal the outstanding notice of induction, the Court does not sit as a super draft board. Judicial review of board action is severely limited, and our duty is done if we are solicitous that the registrant's treatment by the Selective Service

System was in accordance with due process and the Act and regulations which Congress has determined to be in the best national interest.

"The exemption granted by Congress is not a matter of right, but of legislative grace. Being a privilege, it may be abandoned by the holder like any other personal privilege. To be effective, claims to the exemption must be interposed in the manner and at the time prescribed by law or regulation.

"Selective Service Regulation 1625.2, 32 C. F. R. § 1625.2, provides in pertinent part as follows:

> '§ 1625.2 When registrant's classification may be reopened and considered anew. The local board may reopen and consider anew the classification of a registrant (a) upon the written request of a registrant, * * * if such request is accompanied by written information presenting facts * * * which, if true would justify a change in the registrant's classification; * * * provided * * * the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction * * * unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.'

"The Regulation sets forth both the manner and the time in which requests for reopening, to merit consideration, must be made. The requirement that claims for reclassification be in writing and accompanied by a written statement of the facts upon which the registrant relies is no more than a reasonable administrative provision to enable the local board to assess fairly the seriousness and substantiality of the

registrant's request. Conversely, the insistence upon documentary information relieves the members of the board of the fruitless task of searching each tentative and ambiguous act of a registrant in order to ascertain whether it might not foretell the existence of an inchoate claim to exemption. In order to allow the board a fair opportunity to consider the request, the written information must be submitted sometime before the registrant is scheduled to be inducted. The cut-off date selected for this purpose by the Regulation, the date that the Order to Report for Induction is mailed, is a reasonable part of an orderly administrative process.

"The registrant complied with neither requirement laid down by the Regulation. Perhaps the Regulation would suffice to justify the board's inaction upon registrant's request solely on the ground that reclassification was not sought until after the mailing, on July 17, 1956, of the Order to Report for Induction. Whether that be so or not, his failure to file a written claim by August 1, 1956, the time of the scheduled induction itself, precludes registrant from asserting that he was denied due process of law. Resgistrant cannot now complain that the egg upon which he sat too long was not hatched. The written information required by law was filed too late, and the mere oral request for an SSS Form 150 was not a foundation which required the board to reopen registrant's classification and cancel his scheduled induction. Even assuming that the members of the board were immediately informed of registrant's appearance at the office, they could not know whether this equivocal act was the first step in an assertion of the claim. At most, the bare procurement of an SSS Form 150 indicated that the registrant was considering a change in his status upon which he might or might not ultimately base a request for reclassification.

"Registrant was entitled to Due Process, but he owed reasonable compliance with procedural requirements. There are two sides to every coin. He was denied no procedural right when he submitted no written information which the local board could process.

"The proposition that the untimely steps taken by registrant entitled him to a reopening is rejected. Any other conclusion would allow the indefinite avoidance of military service by registrants who visited their board offices on induction eve to secure Selective Service forms which, if filed, might have served as the basis for a reopening.

"It follows from the foregoing that the induction notice validly imposed upon registrant a duty to submit to induction. Accordingly, it is the judgment of this Court that defendant, having knowingly refused to perform that duty, is guilty of a wilful violation of the Universal Military Training and Service Act, 50 U. S. C. A. Appendix, § 462(a)."

In fact, Monroe had a more meritorious claim than Boyd. Monroe at least asked for a Conscientious Objector Form before his induction date, although after the mailing of the order to report. Boyd did not even do that. Boyd did nothing until almost two months after his induction date.

What then, it may be asked, was the Local Board doing in asking about defendant's pioneer status and in issuing a conscientious objector form? The answer is found in Section 1625.4, *supra:* They were merely considering information in deciding whether or not to reopen. They decided not to reopen and they so advised the defendant as required by the regulations [SSF 62].

Since the Local Board did not reopen they did not deny the defendant due process of law by failing to give him a personal appearance, notice of reclassification, right to appeal, etc. He was only entitled to such rights if his classification had been reopened.

III.

Defendant Was Not Denied Due Process Because He Could Not Appeal From the Local Board's Refusal to Reopen.

This point was decided in *Klubnikin v. United States,* 227 F. 2d 87, 90-1 (9 Cir., 1955). Judge Orr there said:

> "Appellant argues that the Selective Service Regulations provide no administrative appeal from a decision of a local draft board's refusing to reopen a case upon request of a registrant for reclassification and, hence, is a denial of due process.[3] The machinery established by the Selective Service Regulations is and of necessity must be geared to the prodigious task of processing millions of registrants.[4] The regulations grant an administrative appeal whenever there has been a reclassification of a registrant by his local draft board. See 32 C. F. R. § 1625.13. Moreover, whenever the local draft board initially determines that sufficient facts have been alleged by the registrant to warrant the reopening of his classification its final decision on whether or not a new classification shall be awarded is appealable. See 32 C. F. R. § 1625.11. It is only where the local board determines that the registrant has failed to set forth sufficient facts to warrant reconsideration that no administrative review is afforded. See 32 C. F. R. § 1625.4. Pro-

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[3]See 32 C. F. R. § 1625.

[4]See *United States v. Palmer* (3 Cir., 1955), 223 F. 2d 893, 895.

vision for review on refusal to reclassify would invite successive frivolous appeals designed to delay induction and frustrate the purposes of the Act.[5] The regulations provide for fair and adequate procedure."

IV.

The Authorities Cited by Defendant Are Distinguishable.

Defendant cites *United States v. Underwood,* 151 Fed. Supp. 874 (E. D. Pa., 1955), *United States v. Vincelli,* 215 F. 2d 210, 216 F. 2d 681 (2 Cir., 1954), *United States v. Packer,* 200 F. 2d 540 (2 Cir., 1952), *reversed on other grounds,* 346 U. S. 1 (1953), *Olvera v. United States,* 223 F. 2d 880 (5 Cir., 1955) and *Knox v. United States,* 200 F. 2d 398 (9 Cir., 1952), in support of his argument that the issuance of the Special Form for Conscientious Objectors constituted a reopening of defendant's classification.

These cases are not in point.

In *United States v. Underwood, supra,* there was no waiver of the defendant's claim nor an estoppel to assert it such as exists here.

In the other cases, the Special Forms for the Conscientious Objectors were apparently issued and returned to the local boards before the defendants were ordered to report for induction. Thus, the clear mandate of Section 1625.2, *supra,* was never encountered.

Here, however, the Special Form was neither issued nor returned until after both the mailing of the order to report and the induction date.

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[5]See United States *ex rel. La Charity v. Commanding Officer,* (2 Cir., 1944), 142 F. 2d 381, 382.

V.

Section 1625.2 Is Not Void nor Inapplicable to Conscientious Objector Cases.

Section 6(j) of the Military Training and Service Act, Section 456(j), Title 50 Appendix, United States Code, provides that

> "nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

While Congress did not set a cutoff date for claiming exemption in so many words, they intended that it should be the date the defendant was ordered to report for induction.

Section 6(j), as it appeared in the Selective Service and Training Act of 1948, 62 Stat. 604, was amended by Section 1(g) of Public Law 51, 65 Stat. 75, 86, on July 15, 1951. The amendment provided that conscientious objectors should perform twenty-four months of civilian work in lieu of deferment. The portion of 6(j) quoted above was not changed.

Section 1625.2 of the Selective Service Regulations, contained in Executive Order 9988, issued August 21, 1948, provided at the time of the 1951 amendment that "the registration of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252). . . ."

The 1951 amendment shows Congressional approval of the 1948 regulation. The authority is *Sterrett v. United States,* 216 F. 2d 659, 665 (9 Cir., 1954). There the court was also interpreting Section 6(j). Appellants had

been classified I-O, conscientious objector, by their local boards and had appealed for IV-D, minister, classifications. The Appeal Board held they were not entitled to the I-O classifications. The question was whether they were entitled to a conscientious objector hearing by the Department of Justice. Section 6(j) provided for such hearing if the conscientious objector claim was "not sustained by the local board." The Government contended that the claim was sustained by the local board and hence they were not entitled to a hearing. The court, however, decided otherwise. The court said that during the time that 6(j) was in effect as part of the 1940 Act and after the re-enactment of that section in 1948 the regulations had provided for a conscientious objector hearing in all cases where the appeal board denied the claim, regardless of whether it had been sustained by the local board. Then the court said:

> "When Congress substantially reenacted the provisions of the 1940 Act [in 1948], the Administrative Regulations . . . interpreting and construing the Act and long continued without substantial change will be deemed to have received Congressional approval."

This language is as applicable to the 1951 amendment as to the 1948 re-enactment. Thus, Section 1625.2 should be deemed to have received Congressional approval.

Conclusions.

1. Defendant waived his conscientious objector claim or was estopped to assert it.

2. The Local Board did not deny defendant procedural due process in refusing to reopen and reclassify.

3. Defendant was not denied due process because he could not appeal from the Local Board's refusal to reopen.

4. The authorities cited by defendant are distinguishable.

5. Section 1625.2, is not void nor inapplicable to conscientious objector cases.

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT JOHN JENSEN,
Assistant U. S. Attorney,
Chief, Criminal Division,

ROBERT D. HORNBAKER,
Assistant U. S. Attorney,

Attorneys for Appellee United States of America.

No. 16215

United States
Court of Appeals
for the Ninth Circuit

LESLIE M. SIBERELL, on Behalf of Himself and His Co-defendants, OLIVER D. SIBERELL, JAMES P. SIBERELL, MARTHA E. JONES, DAISY M. BISHOP, and MABEL ROBSON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California Central Division

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—1-23-59

No. 16215

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LESLIE M. SIBERELL, on Behalf of Himself and His Co-defendants, OLIVER D. SIBERELL, JAMES P. SIBERELL, MARTHA E. JONES, DAISY M. BISHOP, and MABEL ROBSON,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

J. B. TIETZ,
257 So. Spring Street,
Los Angeles 12, California.

For Appellee:

LAUGHLIN E. WATERS,
United States Attorney;

HERBERT M. WEISER,
Assistant U. S. Attorney,
821 Federal Building,
Los Angeles 12, California.

United States District Court, Southern District of California, Central Division

No. 3472-WB Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

529,533 ACRES OF LAND, MORE OR LESS, IN THE COUNTIES OF INYO, KERN and SAN BERNARDINO, STATE OF CALIFORNIA; and UNKNOWN OWNERS,

Defendants.

AMENDMENT TO THIRD AMENDED COMPLAINT IN CONDEMNATION

Comes Now the plaintiff United States of America, by Laughlin E. Waters, United States Attorney, and Ashley Stewart Orr, Assistant U. S. Attorney, and in accordance with Rule 71A, Federal Rules of Civil Procedure, hereby amends the Third Amended Complaint in Condemnation on file herein by adding the following defendants to the action: * * * Minnie V. Liberell.

Dated: April 16, 1956.

LAUGHLIN E. WATERS,
United States Attorney;
ASHLEY STEWART ORR,
Assistant U. S. Attorney,

By /s/ ASHLEY STEWART ORR,
Attorneys for Plaintiff.

[Endorsed]: Filed April 19, 1956.

[Title of District Court and Cause.]

CERTIFICATE FOR SERVICE BY PUBLICATION

Ashley Stewart Orr, Assistant U. S. Attorney, one of the attorneys for plaintiff in the above-entitled action, hereby certifies that he believes the hereinafter named defendants cannot be personally served because, after diligent inquiry within the states in which this action is pending the places of residence of said defendants cannot be ascertained by plaintiff, or, if ascertained, the places of residence of said defendants are beyond the territorial limits of personal service as provided in Rule 71A, Federal Rules of Civil Procedure: * * * Minnie V. Liberell * * *

Dated: April 16, 1956.

LAUGHLIN E. WATERS,
United States Attorney;
ASHLEY STEWART ORR,
Assistant U. S. Attorney;

By /s/ ASHLEY STEWART ORR,
Attorneys for Plaintiff.

[Endorsed]: Filed April 19, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF PUBLICATION AND MAILING

Ashley Stewart Orr, one of the attorneys for plaintiff in the above-entitled action, hereby certifies

that he caused the publication once a week for three (3) consecutive weeks in the San Bernardino Evening Telegram and The Evening Index of the Notice, a printed copy of which, with the name of the newspaper and dates of publication marked thereon, is attached to the Affidavit of Publication attached hereto, and that he caused a copy thereof to be mailed to the defendants named therein at their last known places of residence.

Dated: May 22, 1956.

LAUGHLIN E. WATERS,
United States Attorney;
ASHLEY STEWART ORR,
Assistant U. S. Attorney;

By /s/ ASHLEY STEWART ORR,
Attorneys for Plaintiff.

AFFIDAVIT OF PUBLICATION

U. S. Department of Justice

State of California,
County of San Bernardino—ss.

The undersigned affiant, being duly sworn, deposes and says:

That I now am and at all times herein mentioned was a citizen of the United States, over the age of twenty-one years, and not a party to nor interested in the above-entitled matter; that I am the principal clerk of the printer and publisher of a newspaper,

to wit, San Bernardino Evening Telegram and The Evening Index; that the same was at all times herein mentioned a newspaper of general circulation printed and published daily, except Sunday, in the City of San Bernardino, in the County of San Bernardino, State of California; that said newspaper has been adjudged a newspaper of general circulation by the Superior Court of the State of California, in and for the County of San Bernardino, by a judgment of said Superior Court duly made, filed and entered on June 20, 1952, in the records and files of said Superior Court in that certain proceeding entitled In the Matter of the Ascertainment and Establishment of "San Bernardino Evening Telegram and The Evening Index" as a Newspaper of General Circulation, numbered 73082 in the records of civil proceedings in said Superior Court; that said judgment has not been amended or set aside and was in full force and effect at all times therein mentioned; that the notice or other process or document hereinafter mentioned was set, printed and published in type not smaller than nonpareil and was preceded with words printed in black face type not smaller than nonpareil describing and expressing in general terms the purport or character of the notice intended to be given; that the Notice of Filing Complaint in Condemnation, Amended Complaints in Condemnation, and Amendment to Third Amended Complaint in Condemnation, Civil No. 3472-WB of which the annexed is a true printed copy was published in each edition and issue of said newspaper, and not in any supplement thereof, on

each of the following dates, to wit: April 23, 30; May 7, all in the year 1956.

[Seal] /s/ BILLIE WATTENBARGER.

Subscribed and sworn to before me this 7th day of May, 1956.

/s/ LLOYD M. CAREY,
Notary Public in and for the County of San Bernardino, State of California.

[Endorsed]: Filed May 22, 1956.

[Title of District Court and Cause.]

AFFIDAVIT OF MAILING

State of California,
County of Los Angeles—ss.

Lillian K. Perkins, being first duly sworn, deposes and says:

That she is a citizen of the United States and a resident of Los Angeles County, California; that her business address is 821 Federal Building, Los Angeles 12, California; that she is over the age of eighteen years, and not a party to the above-entitled action;

That on October 22, 1957, she deposited in the United States mails in the post office at Temple and Main Streets, Los Angeles, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of Findings of Fact, Conclusions of

Law, and Judgment and Decree Fixing Compensation and Determining Absence of Interest of Certain Parties as to Parcels 4, 26, 37, 51, 60, 92, 94, 96, 108, 150, 160A, 170, 171, 200, 206, 207, 208, 209A, 210, 230, 245, 252, 275, 302, 324, 335, and 336, in Kern County; 263, 269, 272, 277, 279, 280, 286, 417, 418, 458, 459, 460, 461, 462, 488, 489, 499, 500, 501, 554, 555, 556, 557, 558, 559, 560, and 561 in Inyo County; and 412, 467, 477, 478, 479, 480, 481, and 509 in San Bernardino County, addressed to the parties listed on the attached Schedule "A," at which places there is delivery service by United States mail from said post office.

/s/ LILLIAN K. PERKINS.

Subscribed and sworn to before me this 22nd day of October, 1957.

JOHN A. CHILDRESS,
Clerk United States District Court, Southern District of California.

[Seal] /s/ IRWIN YOUNG,
Deputy.

Schedule "A"

Leslie M. Siberell,
6162 Annan Way,
Los Angeles 42, Calif.

[Endorsed]: Filed October 22, 1957.

United States District Court, Southern District of California, Central Division

No. 3472-WB Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

529,533 ACRES OF LAND, MORE OR LESS, IN THE COUNTIES OF INYO, KERN AND SAN BERNARDINO, etc., et al.,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT AND DECREE FIXING COMPENSATION AND DETERMINING ABSENCE OF INTEREST OF CERTAIN PARTIES

As to Parcels

* * *

481 (Bird's Eye Porphyry Lode), and
509 (Red S. Lode), in San Bernardino County.

The above-entitled matter came on for hearing before the United States District Court, Southern District of California, Central Division, the Honorable William M. Byrne, Judge of the above-entitled court, presiding, sitting without a jury, in Courtroom No. 3, in the United States Post Office and Court House Building, Los Angeles, California, commencing at 2:00 p.m., July 22, 1957, and continuing through July 23, 1957, this being the time and

place as fixed by the Court for the determination of just compensation payable by the plaintiff for the real properties and premises herein and in these proceedings designated, described and referred to as Parcels 280, 335, 336, 412 (Liberty Lode); 481 (Bird's Eye Porphyry Lode); 488 (Iron Chief Lode); 489 (Iron Mask Lode); 500 (White Pumice No. 2 Placer); 554, 555, 556, and 557 (Noll No. 1 to No. 4, inclusive, Placer); and 558, 559, 560, and 561 (Mary Lea Lode Nos. 1 to 4, inclusive);

* * *

It appearing that the following defendants, and unknown owners not appearing herein, except those appearing at this hearing, hereinabove referred to, as to the parcels herein set forth, were served in this action, as follows:

* * *

R. L. Steven, Ray L. Steven, Raymond L. Steven, Louie R. Osborne, Louis R. Osborne, C. M. Christensen, and Minnie V. Liberell, as to Parcel 481 (Bird's Eye Porphyry Lode);

* * *

It appearing to the Court that said defendants have been duly and regularly served with notice of filing of the Complaint in Condemnation, as amended, and with notice of this hearing, and that said defendants have, and each of them has, failed to appear herein, and the time by which they could by law appear herein having elapsed; witnesses on behalf of the plaintiff having been called, and the Court having considered the testimony of the wit-

nesses and the statements of plaintiff's counsel as to title; the Court being fully advised in the premises, now makes the following:

Findings of Fact

* * *

(ff) The defendants Raymond L. Steven (also known as Ray L. Steven and R. L. Steven), Louis R. Osborne (also known as Louie R. Osborne), C. M. Christensen, and Minnie V. Siberell (sued as Minnie V. Liberell), have an interest in Parcel 481 (Bird's Eye Porphyry Lode), and said defendants are entitled to the just compensation awarded for the taking of said parcel. No other persons have any interest or any right to the compensation awarded for the condemnation and taking of said parcel and shall take nothing in this action.

* * *

V.

The fair market value for each of the parcels hereinafter set forth was, on February 24, 1944, the date of the filing of the Order of Immediate Possession in this action, as follows:

Parcel No.	Fair Market Value

* * *

481 (Bird's Eye Porphyry Lode)	$100.00

* * *

Wherefore, based upon the foregoing Findings of Fact, the Court makes the following:

Conclusions of Law

I.

That upon the filing of the plaintiff's Complaint in Condemnation on Febuary 23, 1944, and the entry of an Order of Immediate Possession on February 24, 1944, plaintiff acquired title and interest in and to the several parcels of real property herein referred to as Parcels * * * 481 (Bird's Eye Porphyry Lode), * * *

IV.

That upon the filing of this judgment and decree, the right to just compensation for said parcels of real property herein described and referred to as Parcels 412 (Liberty Lode), 481 (Bird's Eye Porphyry Lode), 488 (Iron Chief Lode), 489 (Iron Mask Lode), 500 (White Pumice No. 2 Placer), 554, 555, 556 and 557 (Noll No. 1 to No. 4, inclusive, Placer), and 558, 559, 560 and 561 (Mary Lea Lode Nos. 1 to 4, inclusive), became and was vested in the following-named defendants, in the following amounts, respectively:

Parcel	Name	Amount
481		

* * *

(Bird's Eye Porphyry Lode)—Raymond L. Steven (aka Ray L. Steven and R. L. Steven), Louis R. Osborne (aka Louie R. Osborne), C. M. Christensen, and Minnie V. Siberell (sued as Minnie V. Liberell), $100.00.

* * *

Judgment

Wherefore, based upon the above and foregoing Findings of Fact and Conclusions of Law, it is hereby Ordered, Adjudged and Decreed by this Court:

I.

That on February 23, 1944, there was filed by the plaintiff, United States of America, its Complaint in Condemnation, as subsequently amended; that on February 24, 1944, the plaintiff, United States of America, was granted the right of immediate possession in and to those certain parcels, as to the estates and interests described in its Complaint in Condemnation, as amended, and in its declarations of taking, on file herein, set forth as follows:

* * *

481 (Bird's Eye Porphyry Lode), and

* * *

II.

That the following-named defendants have judgement, respectively, against the United States of America, in the following sums, together with interest thereon at the rate of 6 per cent per annum from February 24, 1944, to and including the date of deposit of said funds into the Registry of this Court:

Parcel	Vestee	Amount of Award

* * *

481 (Bird's Eye Porphyry Lode)—Raymond L. Steven (aka Ray L. Steven and R. L. Steven),

Louis R. Osborne (aka Louie R. Osborne), C. M. Christensen, and Minnie V. Siberell (sued as Minnie V. Liberell), $100.00.

* * *

IX.

That the plaintiff has the legal right to take and acquire the real property for the estates and for the purposes set forth in its Complaint in Condemnation, as amended, and in its declarations of taking, on file herein.

The Court hereby retains jurisdiction to make and enter such further orders and judgments which may be necessary and proper in the premises.

Dated: October 31, 1957.

/s/ WM. M. BYRNE,
United States District Judge.

Presented by:

LAUGHLIN E. WATERS,
United States Attorney;

JOSEPH F. McPHERSON,
Assistant U. S. Attorney;

By /s/ JOSEPH F. McPHERSON,
Attorneys for Plaintiff,
United States of America.

Lodged: October 22, 1957.

[Endorsed]: Filed and entered November 1, 1957. 1957.

United States District Court, Southern District of California, Central Division

Civil No. 3472-WB

UNITED STATES OF AMERICA,

Plaintiff,

vs.

529,533 ACRES OF LAND, MORE OR LESS, IN THE COUNTIES OF INYO, KERN AND SAN BERNARDINO, etc., et al.,

Defendants.

ANSWER TO DEFENDANTS' MOTION TO VACATE AND AFFIDAVIT IN SUPPORT THEREOF

(As to Parcel 481)

Comes Now plaintiff, United States of America, by its attorneys of record, Laughlin E. Waters, United States Attorney, by Herbert M. Weiser, Assistant United States Attorney, and respectfully represents to the court:

That the files on record of this cause reveal that on October 22, 1957, a copy of the Findings of Fact and Conclusions of Law and Judgment and Decree fixing compensation and determining the absence of interests of certain parties was lodged with this Honorable Court and that on that same date a copy thereof was mailed to Mr. Leslie M. Siberell, 6162 Annan Way, Los Angeles 42, California, all as appears in the Affidavit of Mailing, filed October 22, 1957.

Plaintiff further represents that letters and documents in the file maintained by plaintiff indicate that defendant, Leslie M. Siberell, was in possession of knowledge of the substance of this matter and was in correspondence with the United States Attorney's office on these matters as early as August 26, 1957, all as appears in plaintiff's affidavit below.

Wherefore, plaintiff prays that defendant's motion to vacate judgment be denied.

Dated: This 2nd day of April, 1958.

LAUGHLIN E. WATERS,
United States Attorney;

HERBERT M. WEISER,
Assistant U. S. Attorney;

By /s/ HERBERT M. WEISER,
Attorneys for Plaintiff.

Affidavit of Herbert M. Weiser in Support of Plaintiff's Answer to Motion

County of Los Angeles,
State of California—ss.

Herbert M. Weiser, being first duly sworn, deposes and says:

1. That he is the Assistant United States Attorney in possession of plaintiff's files with reference to Parcel 481 in Civil No. 3472-WB.

2. That there is contained in this file the following correspondence.

(a) A letter signed by Leslie M. Siberell, 6162 Annan Way, Los Angeles 42, California, addressed to Mr. McPherson, 821 Federal Building, 312 N. Spring Street, Los Angeles, California, dated August 26, 1957.

(b) A carbon copy of a letter dated August 26, 1957, from Joseph F. McPherson, Assistant U. S. Attorney, to Mr. Leslie M. Siberell, 6162 Annan Way, Los Angeles 42, California.

(c) A carbon copy of a letter dated September 17, 1957, from Joseph F. McPherson, Assistant U. S. Attorney, to Mr. Leslie M. Siberell.

(d) Carbon copy of a letter dated October 21, 1957, from L. G. Lewis, Lieutenant Commander, USN, addressed to Mr. Leslie M. Siberell.

(e) Carbon copy of a letter dated December 12, 1957, from Laughlin E. Waters, United States Attorney, addressed to Commandant, Eleventh Naval District, San Diego 32, California.

Dated: This 3rd day of April, 1958.

/s/ HERBERT M. WEISER,
Assistant U. S. Attorney.

Sworn to and Subscribed before me this 3rd day of April, 1958.

[Seal] /s/ MARGARET M. COLLINS,
Notary Public in and for Said County and State.

My Commission Expires February 25, 1961.

26 August, 1957.

Mr. McPherson,
821 Federal Bldg.,
312 N. Spring Street,
Los Angeles, California.

Lands Division of the Justice
Dept. of the U. S. Government.

Dear Sir:

Re: Our telephone conversation pertaining to the Bird's Eye Porphyry Claim No. 481.

Enclosed please find certified photostatic copy of order settling final account and for distribution of the assets, (In the Matter of the Estate of Minnie V. Siberell, deceased).

Please return this photostatic copy to me when you have obtained your copy of same.

Also I am sending you a copy of the certified photostatic copy of sale of Mining Claim which you may keep for your file if you so desire.

If you will send me the forms that we discussed Re: the relinquishment of interest by Mr. Lou Osborne, 316 E. 186th St., Los Angeles, I will sincerely endeavor to obtain his signature.

Yours very truly,

/s/ LESLIE M. SIBERELL,
6162 Annan Way,
Los Angeles, 42 California.

[Stamped]: Received, Aug. 28, 1957. U. S. Atty.-Lands Division, Los Angeles, California.

August 26, 1957.

Mr. Leslie M. Siberell,
6162 Annan Way,
Los Angeles 42, California.

Re: Civil No. 3472-WB, Parcel 481
(Bird's Eye Porphyry Lode.)

Dear Mr. Siberell:

In accordance with today's telephone conversation, enclosed are disclaimers for execution by Raymond L. Steven and Louis R. Osborne, the originals of which should be signed by said persons and returned to this office. The carbon copies are for their file.

Upon receipt of the signed disclaimers and a certified copy of Decree of Distribution of the Estate of Minnie V. Siberell, this office will cause an order for distribution to be entered in this action for payment to be made to you of the amount due for the taking of Parcel 481. The amount due, $100.00, plus interest, must be obtained from the acquiring agency, which will require approximately six weeks.

The enclosed self-addressed envelope, requiring no postage, may be used for forwarding the above-referenced documents to this office.

Very truly yours,

LAUGHLIN E. WATERS,
United States Attorney;

JOSEPH F. McPHERSON,
Assistant U. S. Attorney.

September 17, 1957.

Mr. Leslie M. Siberell,
6162 Annan Way,
Los Angeles 42, California.

Re: Civil No. 3472-WB, Parcel 481
(Bird's Eye Porphyry Lode Mining Claim).

Dear Mr. Siberell:

The record owners of the above mining claim are Raymond L. Steven (who has disclaimed), Louis R. Osborne, C. M. Christensen and Minnie V. Siberell, your mother.

The Bird's Eye Porphyry Lode Mining Claim is located approximately in Section 27, Township 25 South, Range 42 East (unsurveyed). The appraiser employed by the Government indicated that it is located in the rough granite hills toward the south edge of the South Argus Range, at an elevation of about 3500 feet, about 3½ miles west from Searles Lake, and accessible by primitive road about ten miles from Salt Wells. A map showing the location of the mine is attached.

Very truly yours,

LAUGHLIN E. WATERS,
United States Attorney;

JOSEPH F. McPHERSON,
Assistant U. S. Attorney.

cc: Commander,
Naval Ordnance Test Station,
Inyokern, California,
(with copy of map).

U. S. Naval Ordnance Test Station
China Lake, California

Mr. Leslie M. Siberell,
6162 Annan Way,
Los Angeles 42, California.

Dear Mr. Siberell:

We are in receipt of your letter of 13 September, 1957, giving us the location of Parcel No. 481 (Bird's Eye Porphyry Lode Mining Claim).

We have inspected your claim which due to tests being conducted in the immediate vicinity is only accessible by helicopter. Due to the nature of these tests, it is not possible to take personnel into this area to inspect property at present, and there is a possibility that this area cannot be entered until about July, 1958.

We deeply regret that this reply to your inquiry cannot be favorable, but trust you will understand that this action is in the interest of your own safety and the security of this activity. If there is any way in which we can be of further help to you, we shall be glad to do so.

Sincerely yours,

L. G. LEWIS,
Lieutenant Commander, USN, Security Officer. By direction of the Commander.

cc: Joseph F. McPherson,
Assistant U. S. Attorney.

[Stamped]: Received Oct. 23, 1957. U. S. Atty.-Lands Division, Los Angeles, California.

December 12, 1957.

Commandant,
Eleventh Naval District,
San Diego 32, California.

Re: Civil No. 3472-WB, Parcel 481—Bird's Eye Porphyry Lode Mining Claim.

Dear Sir:

On October 24, we addressed the Commander of the U. S. Naval Ordnance Test Station at China Lake, California, to the effect that one Leslie M. Siberell, one of the owners of the Bird's Eye Porphyry Lode Mining Claim, a portion of the property being acquired by the United States, had requested an opportunity to have access to the claim in order to sample it and to appraise its value.

We informed the Commander that, under the law, the former owner has this right, and we asked whether or not it would be possible to give access to Mr. Siberell on either a Saturday, a Sunday or a

iday. To date we have not had the courtesy of a
ly. Mr. Siberell is pressing us for an answer, and
shall appreciate any assistance you can render

Very truly yours,

LAUGHLIN E. WATERS,
United States Attorney.

Commander,
U. S. Naval Ordnance Test Station,
China Lake, California.
(Attention: L. G. Lewis, Lt. Comdr., Sec. Officer.)

Leslie M. Siberell,
6162 Annan Way,
Los Angeles 42, California.

ffidavit of Service by Mail attached.

Endorsed]: Filed April 3, 1958.

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le of District Court and Cause.]

NOTICE OF MOTION

Laughlin E. Waters, United States Attorney, and Lou R. Osborne, 316 East 186 Street, Gardena, Los Angeles, California.

ou will please take notice that defendant, Leslie Siberell, will move the Court for an order partly vacating the judgment heretofore rendered in above cause, namely, the portion that concerns

the defendant and his brothers and sisters (Parcel 481), relieving them from default and permitting them to file an answer and have their day in court on the matter of the valuation of said Parcel 481 in Courtroom No. 3 on May 26, 1958, at 9:45 a.m. or as soon thereafter as counsel may be heard.

Defendant will rely on the file in the above-entitled cause and on the Motion and Affidavits attached hereto.

/s/ J. B. TIETZ,
Attorney for Defendants.

[Title of District Court and Cause.]

MOTION TO VACATE JUDGMENT AGAINST CERTAIN DEFENDANTS NOT NOTIFIED OF ACTION

Leslie M. Siberell, defendant, on behalf of himself and his brothers and sisters, Oliver D. Siberell, James P. Siberell, Martha E. Jones, Daisy M. Bishop and Mabel Robson, moves the court for an order setting aside so much of the judgment in this case as is against them and relating to Parcel No. 481, and permitting them to defend and plead upon such terms as the court deems just, upon the following grounds:

On the 22nd day of October, 1957, a judgment was lodged with the clerk of this court and was entered

on the 1st day of November, 1957, in the above-entitled cause against this defendant and others; neither this defendant nor any of his brothers and sisters were ever personally served with any summons or complaint nor notified of the pendency of the action against them; on the 19th day of April, 1956, plaintiff filed a certificate for service by publication, and filed an amendment to its Third Amended Complaint in Condemnation, but defendants were never actually notified or aware of the same until after judgment, and they acted diligently to ascertain and protect their rights all as set forth in Leslie M. Siberell's affidavit filed in support of this Motion, and are now desirous of pleading to the complaint filed herein and make defense to the same.

The name of Lou R. Osborne appears in the pleadings as one having or claiming some kind of interest in Parcel 481.

Said defendants have employed experts to survey said mining property in the last past several months and desire to show that the value is greatly in excess of the $100.00 awarded them in the judgment.

/s/ J. B. TIETZ,
Attorney for Defendant.

[Title of District Court and Cause.]

AFFIDAVIT OF DEFENDANT L. M. SIBERELL IN SUPPORT OF MOTION TO VACATE

State of California,
County of Los Angeles—ss.

Leslie M. Siberell, being first duly sworn, deposes:

1. That he is one of the heirs of Minnie V. Siberell, his mother, and is entitled to a 6/30th interest in her estate, by virtue of her will, duly probated in the Superior Court in and for the County of Los Angeles, and being docketed No. GLP 2237.

2. That his brothers and sisters are the only other heirs of said Minnie V. Siberell and that all of them are joining him in this Motion to Vacate Default Judgment.

3. That his mother was given a deed to said Parcel 481 (Birds' Eye Porphyry mining claims) by Ray L. Steven, the joint locator of said claims. The other joint locator is named Lou R. Osborne. Upon information and belief, said information principally being the disclaimer affidavit of Ray L. Steven dated December 16, 1957 (and hereinafter referred to in paragraph 4) affiant alleges that said Osborne had no beneficial interest in Parcel 481.

That said deed was recorded in the County Recorder's Office in San Bernardino County, California, in Book 1412, page 285, Official Records.

4. That at the time said Steven gave affiant's mother said deed he represented that he was the sole

owner of said property; that he subsequently, on December 23, 1957, made an affidavit to that effect, to wit: that he alone did all the assessment work and that no one else had any interest in said property. Said affidavit is on file in the Recorder's Office of San Bernardino County, California, in Book 4397, page 479 Official Records.

5. That on September 18, 1956, when said Ray L. Steven filed a Notice of Appearance in this action, he had no interest in said Parcel 481.

6. Affiant has searched the records of this case and found that service by publication was made in the counties of Inyo, San Bernardino and Kern, but not in the county of Los Angeles.

7. That neither affiant nor any of his brothers or sisters were ever served with summons or notice in this case nor did they learn of the existence of this case until July 22, 1957, when affiant received a telephone call from said Ray L. Steven; that the first official word he received was shortly after October 22, 1957, when the U. S. Attorney informed him by letter, signed by Assistant U. S. Attorney Joseph F. McPherson, that there had been an award of $100.00 to the heirs of Minnie Siberell.

8. Said affiant promptly conferred with said United States Attorney in an effort to have the matter reopened and to have the award increased.

9. Said affiant promptly made efforts to ascertain the true value of said Parcel 481, as is shown by the letters in the files of this case that were made part of plaintiff's answer to the original Motion to Va-

cate; said letters show that affiant promptly endeavored to gain entrance to said Parcel 481 and that by persistence he did gain entrance and that as soon as he learned their true value he promptly filed his Motion to Vacate.

He employed competent mining geologists and assayists and made two trips with geologists to said Parcel 481, all within the last past several months, and can now offer expert evidence that the value of said Parcel 481 is greatly in excess of the $100.00 awarded in said default judgment, to wit, that the property is worth the sum of $100,000.00.

/s/ LESLIE M. SIBERELL.

Sworn to before me and signed in my presence by Leslie M. Siberell, personally known to me, this 2nd day of May, 1958.

[Seal] /s/ J. B. TIETZ,
Notary Public in and for Los Angeles County, California.

Affidavit of service by mail attached.

[Endorsed]: Filed May 8, 1958.

[Title of District Court and Cause.]

MOTION AND STATEMENT IN OPPOSITION TO MOTION OF DEFENDANT LESLIE M. SIBERELL

(As to Parcel 481 Only)

Comes Now the plaintiff, United States of America, by Laughlin E. Waters, United States At-

torney, and Herbert M. Weiser, Assistant United States Attorney, Southern District of California, its attorneys of record herein, and moves and respectfully represents to the Court:

1. That the names and identity of defendant Siberell and any other persons claiming an interest under Minnie V. Siberell are not disclosed by the records, nor were they known to plaintiff at any time prior to the hearing on the question of compensation July 22 and 23, 1957.

2. The last publication for service upon unknown owners with reference to this parcel was on May 7, 1956, as appears in plaintiff's Certificate of Publication and Mailing filed herein May 22, 1956.

3. That plaintiff has done all that is required to complete service upon the persons who claim or may claim an interest in Parcel 481, and has presented competent evidence at the time of the hearing, July 22 and 23, 1957, to support the Court's findings as to the amount to be awarded as just compensation.

4. That no person claiming an interest in Parcel 481 had entered a notice of appearance or filed an answer, or otherwise appeared, until after the entry of the findings of fact and conclusions of law filed herein November 1, 1957.

5. That Title 28, U.S.C.A., Section 1655, has no applicability to this matter.

6. That contrary to defendant Siberell's affidavit, he had been in actual communication with the United States Attorney's Office concerning this mat-

ter as early as August 26, 1957, as appears in plaintiff's answer to defendant's motion to vacate filed herein April 3, 1958.

7. That defendant is not entitled to relief under Rule 60(b) F.R.C.P.; and that the Court may proceed to determine the various rights of persons to participate in the award without vacating or amending the judgment.

Wherefore, plaintiff moves this Court to deny defendant's motion and to adjudge that defendant Leslie M. Siberell and all other persons claiming an interest in or to Parcel 481 have been served and made party to this action and that the findings of fact and conclusions of law filed and entered herein November 1, 1957, are binding and conclusive upon them as to the question of the amount which represents the just compensation for the taking of this parcel.

Dated: This 16th day of May, 1958.

LAUGHLIN E. WATERS,
United States Attorney;

HERBERT M. WEISER,
Assistant United States
Attorney;

By /s/ HERBERT M. WEISER,
Attorneys for Plaintiff.

Affidavit of Mail attached.

[Endorsed]: Filed May 16, 1958.

[Title of District Court and Cause.]

AFFIDAVIT AND PASS IN SUPPORT OF MOTION TO VACATE

Affidavit of John G. Freeman

State of Colorado,
County of El Paso—ss.

John G. Freeman, owner of the Nuclear Exploration Company, a resident of Los Angeles, California, being of lawful age, deposes and says:

The preliminary Mineral Examination conducted on Birds Eye Claims Numbers 1, 2 and 3 located in San Bernardino County, California, and belonging to Mr. L. M. Siberell of Los Angeles, California, showed through sampling and visual examination to be commercially valuable and worthy of further exploration;

That Assays of Surface Samples revealed Ore of commercial grade, and if the values continued under ground, the estimated tonnage will run roughly ten thousand (10,000) tons; the estimated average surface values run approximately $10.00 per ton;

That Core Drilling or any other appropriate exploratory mining method should be conducted on this property to ascertain further continuity of vein structure and ore;

That the Ore Values are not all confined to the Quartz Veins; that adjacent gouge type material in contact with the veins was found to be mineralized,

and in some places showed more value than the Quartz Veins;

That further underground exploration could reveal Ore Values of higher average than the $10.00 surface value, and that it is again recommended that a competent Geologist or Mining Engineer conduct further exploratory work on this property.

That the affiant further saith not.

/s/ JOHN G. FREEMAN.

Subscribed and sworn to before me, a Notary Public in and for El Paso County, Colorado, on the 7th day of May, A.D. 1958.

[Seal] /s/ ETHEL M. FRITCH,
Notary Public.

U. S. Naval Ordnance Test Station
Inyokern
China Lake, California

Serial No. 1251

RECREATION PASS

To: Marine Guards Security Patrol, 6162 Annan Way, Los Angeles 42, Calif.

Pass the bearer, Leslie M. Siberell, ID No. ....., and passengers listed below into Argus Range from 0800, 2/1/58, to 1700, 2/1/58, for the purpose of taking samples from claims. Vehicle

type, '56 Ford pickup, license No. MRS 170, and passengers. Names and ID numbers, John G. Freeman, Harold McFadden.

1. Security Police personnel will call Head, Range Operations, 71395, or Head, Missile Range Div., 71504 for schedule of tests before allowing party to proceed into area. This authority is subject to revision or regulation by the Range Guards at any time firing tests render the area to be visited, dangerous, and is issued to the undersigned subject to the following provisions:

2. That he be personally responsible for all persons in his party and that the area be left in a clean and orderly manner.

3. That he assume all risks of damage or injury to himself and all members of his party.

4. That he assume all claims for death or injury to himself or any person in his party or loss, destruction, or damage to property which occurs in area visited, or traversed in entering or leaving station, and agrees to indemnity and save harmless the U. S. Government from and against any loss, expense, claims or demands to which the Government may be subjected as a result of such death, loss, destruction or damage.

5. Party shall consist of at least 2 vehicles, and shall provide itself with adequate gasoline, water, spare tires, tow rope, first aid kit, tools, shovel and food.

6. Departure and return shall be reported to Security Police, 71324.

7. All road and warning signs must be complied with.

8. Cameras must be declared to Security Police personnel.

9. Guns are prohibited without special permit to hunt predatory animals.

10. Emergency Shelter buildings are so marked. Other buildings must not be entered.

11. Mineral specimens may be taken. All other material, regardless of apparent value, must be left in place. Petroglyphs shall not be removed, mutilated or defaced.

12. Excavations are prohibited.

13. Old mine shafts, mud holes and baths are dangerous, keep out of them.

The undersigned has this 1st day of Feb., 1958, read all the above provisions, and in consideration of the permission herein granted, agrees thereto.

/s/ LESLIE M. SIBERELL.

Authorized and witnessed by:

/s/ V. A. CUMMINS,
Chief of Security Police.

[Endorsed]: Filed May 23, 1958.

United States District Court, Southern District of California, Central Division

No. 3472—WB—Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

529,533 ACRES OF LAND, MORE OR LESS, IN THE COUNTIES OF KERN AND SAN BERNARDINO, etc., et al.,

Defendants.

ORDER DENYING DEFENDANT'S MOTION TO VACATE JUDGMENT

(As to Parcel 481)

This matter came on for hearing before the above-entitled Court on May 26, 1958. Appearing for the plaintiff, United States of America, were its attorneys of record, Laughlin E. Waters, United States Attorney, by Herbert M. Weiser, Assistant United States Attorney. Appearing for the defendants, Leslie M. Siberell, Olive D. Siberell, James P. Siberell, Martha E. Jones, Daisy M. Bishop and Mabel Robson, was their attorney of record, J. B. Tietz.

After hearing oral argument and in consideration of all the files and records contained herein, and good cause appearing therefor, it is hereby ordered that defendant's motion to vacate judgment filed herein May 8, 1958, be denied with prejudice.

Dated: This 4th day of June, 1958.

/s/ WM. B. BYRNE,
United States District Judge.

Presented by:

LAUGHLIN E. WATERS,
United States Attorney;

HERBERT M. WEISER,
Assistant United States Attorney;

By /s/ HERBERT M. WEISER,
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

Lodged May 27, 1958.

[Endorsed]: Filed June 4, 1958.

Entered June 5, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Laughlin E. Waters, United States Attorney, and Lou R. Osborne, 316 East 186th Street, Gardena, California:

Notice is hereby given that Leslie M. Siberell, on behalf of himself and his co-defendants, Oliver D. Siberell, James P. Siberell, Martha E. Jones, Daisy M. Bishop, and Mabel Robson, hereby appeals to the United States Court of Appeals for the Ninth

Circuit from the Order entered on June 5, 1958, denying Motion of said defendants to vacate that portion of the judgment heretofore entered, to wit: The portion that concerned these defendants, namely, relating to Parcel 481, and denying said defendants any relief whatsoever.

Dated at Los Angeles this 28th day of July, 1958.

/s/ J. B. TIETZ,
Attorney for Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 28, 1958.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

I.

The Court erred in denying defendants, Siberell, et al., an order partially setting aside the judgment.

II.

The Court erred in refusing to permit defendants, Siberell, et al., permission to answer and defend on Parcel 481.

/s/ J. B. TIETZ,
Attorneys for Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 2, 1958.

[Title of District Court and Cause.]

DOCKET ENTRIES

4/19/56—Fld pltfs certif for svce by publn. Fld amendmt to 3rd amd compl in condemn.

4/20/56—Fld 3 cc ltrs fr US Atty to Bakersfield Californian, San Bernardino Evening Telegram & The Bishop Inyo Register re affid serv by publn of not of flg compl in condemnation.

6/16/56—Fld cert of publication & mlg. Fld affid of svce by mail of not of flg compl amended complaints & amendmnt to 3rd amended compl.

5/22/56—Fld affid of svce by mail of not of flg compl in condem, amd compls in condem & amdmt to 3rd amd compl in condem. Fld certif of publn & mlg. Fld affid of svce by mail upon defts hvg interest in land in Kern Co. Fld certif of publn & mlg of not in Bakersfield, California.

* * *

7/12/57—Fld notice trial set for 7/22/57, 2 p.m.

* * *

7/22/57—Ent procs ct trial as to parcs (Kern Co. Fee Parcels) 4, 26, 37, 51, 60, 92, 94, 96, 108, 150, 160A, 170, 171, 200, 206, 207, 208, 209A, 210, 275, 230, 245, 252, 302, 324, 335, 336 (Inyo Co. Fee parcels) 263, 269, 272, 277, 279, 280, 286, 417, 418, 458, 459, 460, 461, 462, 488, 489,

499, 500, 501, 554, 555, 556, 557, 558, 559, 560, 561 (San Bernardino Co. Mining claims) Parcel 412, 467, 477, 478, 479, 480, 481, 509. Ent ord contd to 7/23/57, 9:45 a.m. for fur trial. Fld stip for judg as to parcels 417 & 501, White Elephant Nos. 1 and 2 Placer Mining Claims and parcels 418 & 499 World Beater Nos. 1 and 2 Plamer Mining Claims.

7/23/57—Ent procs fur ct trial as to (Kern Co. Fee parcels 4, 26, 37, 60, 92, 94, 96, 108, 150, 160A, 170, 171, 200, 206, 207, 208, 209A, 275, 230, 245, 252, 302, 324, 335, 336 (Inyo Co. Fee parcels 263, 269, 272, 279, 280, 286, 417, 418, 458, 459, 460, 461, 462, 488, 489, 499, 500, 501, 554, 555, 556, 557, 558, 559, 560, 561 (San Bernardino Co. Mining Claims) 412, 467, 477, 478, 479, 480, 481, 509. Ent ord that just compen for tkg of various parcels be as follows: Kern Co. Fee parcels, Parcel 335, in amt $50.00; Parcel 336 in amt $50.00. Inyo Co. Fee parcels, parcel 28, in amt $5.00; Parcel 488, Iron Chief Lodge in amt $2,716. Parcel 489, Iron Mask Lode in amt $2,716.

* * *

10/22/57—Lodged plfs prop finds fact, concls law & jgmt & decree fixg compens & determ absence of interest of cert parties as to

cert parties as to cert parcels, Fld affid of mailing.

11/ 1/57—Fld finds fact, concl law & judg condem parcels land, vesting title certain parcels in USA, & fixg compens for cert parcels to cert defts, all as shown below. Fxg compens for parc 412 in sum $1,500.00 to Oliver Hopkins, 481 in sum $100.00 to Raymond L. Steven, et al.; 488 in sum $2,716.00 to John T. McCord, et al.; 489 in sum $2,716.00 to Chester P. Smith, et al.; 500 in sum $1,490.00 to Gerald C. Hidecker; 554, 555, 556 & 557 in sum $100.00 for each parc to W. J. Van Valkenburgh, et al.; 588, 559, 560 & 561 in sum $100.00 for each parc to W. J. Van Valkenburgh, et al.; 280 in sum $5.00 to State of Calif.; 335 in sum $50.00 to Dallas B. Lanterman, et al.; 336 in sum $50.00 to Lauretta H. Evans; 417, 418, 499 & 501 in sum $17,000.00 to Earl R. Lillie, et al.; that title to parcs 60, 269, 272, 277 was vested in USA as of 5/8/46, fxg date of vesting title to parcs 4, 26, 51, 92, 94, 96, 108, 150, 170, 171, 200, 230, 245, 252, 263, 279, 286, 302, 324, 458, 459, 460, 461, 462, 467, 477, 478, 479, 480 & 509 in USA, that USA has unencumbered title to Parc 160A, dismiss parc 275 from proceeds, etc. (Ent 11/1/57.)

* * *

12/17/57—Fld disclaimer Raymond L. Steven, etc., as to parcel 481 (Bird's Eye prophyry Lode) only.

* * *

1/ 7/58—Fld disclaimer C. I. Christensen Par 481 (Birds Eye Porphyry Lode Only).

* * *

3/25/58—Fld decree vesting title follow parcs in USA as of date shown: Parc 22, 6/30/44; Parc 30, 5/16/44; Parc 30-A, 5/16/44, and Parc 61, 4/5/45, etc. (Ent 3/26/58.) Fld mot defts L. M. Siberell, et al., to vacate judgt as to parcel 481 with not mot retble 4/7/58 & affid in suppt.

* * *

4/ 3/58—Fld pltfs ans to defts mot to vacate & affid in suppt as to parcel 481.

4/ 7/58—Ent procs hrg mot deft Leslie M. Siberell for an ord partially vacatg judgmt htf rendered in Par 481 & ent ord denyg mot w/o prej.

* * *

5/ 8/58—Fld mot defts Leslie M. Siberell, etc., to vacate judgt deflt & permit filing of Answer as to parcel 481 with not mot retble 5/26/58, affids pts & auths, etc.

5/16/58—Fld Mot & statmt in oppos to mot of deft Leslie M. Siberell & memo of pts

& auths in suppt thereof as to parc 481 only.

* * *

5/22/58—Fld pltfs supplemtal state in opposition to defts mot to vacate.

5/23/58—Fld affid John G. Freeman & pass in suppt mot to vacate & fld affid ser.

5/26/58—Ent procs hrg mot deft Leslie M. Siberell for ord partially vacating judg htf rendered, namely, Par 481 & ent ord denying mot. Counsel for Govt is directed to prepare, serv & lodge formal ord purs to Local Rule 7.

5/27/58—Lodged ord denying defts mot to vacate judgt parcel 481.

6/ 4/58—Fld ord deny mot of defts Leslie M. Siberell, et al., to vacate judg re parc 481 fld 5/8/58, with prej. (Ent 6/5/58 & not attys.) Fld amended appear Gerald C. Hidecker.

7/28/58—Fld not appeal Leslie M., Oliver D. & James P. Siberatt, Martha E. Jones, Daisy M. Bishop & Mabel Robson with affid serv by mail.

8/29/58—Fld desig rec on appeal Mabel Robson, Leslie M. Siberell, Oliver D. Siberell, etc.

9/ 2/58—Fld ord time to docket record on appeal extended to 10/26/58.

9/ 5/58—Fld desig of record on appeal by appellee as to parcel 481 only.

10 2/58—Fld stmt pts appellants Siberell, etc., intends to reply on appeal.

10/ 2/58—Issd & fwd to CA transc rec on appeal Parcel 481, 4 pp at .40c, $1.60.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled matter:

A. The foregoing pages numbered 1 to 40, inclusive, containing the original:

Answer to Defendant's Motion to Vacate and Affidavit in support thereof (as to Parcel 481).

Notice of Motion, Motion to Vacate, Affidavits in support, etc.

Motion and Statement in opposition to Motion of Defendant Leslie M. Siberell, etc.

Affidavit and Pass in Support of Motion to Vacate.

Order Denying Defendant's Motion to Vacate Judgment as to Parcel 481.

Notice of Appeal.

Designation of Record (Appellants).

Extension of time to prepare and docket appeal.

Designation of Record (Appellee).

Statement of Points.

I further certify that my fee for preparing the foregoing record, amounting $1.60, has been paid by appellant.

Dated: October 2, 1958.

[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ WM. A. WHITE,
Deputy Clerk.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the Supplemental transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled matter:

A. The foregoing pages numbered 1 to 49, inclusive, containing the original:

Amendment to Third Amended Complaint in Condemnation, filed 4/19/56.

Certificate for Service by Publication, filed 4/19/56.

Certificate of Publication and Mailing, filed 5/22/56.

Affidavit of Mailing, filed 10/2/57.

Findings of Fact, Conclusion of Law, and Judgment and Decree, etc., entered 11/1/57.

Suggestion of Plaintiff-Appellee to complete

Designation of Record on Appeal to supply omissions, and Order thereon (as to Parcel 481 only).

B. Copy of Docket entries.

I further certify that my fee for preparing the foregoing record, amounting $1.20, has not been paid by appellee.

Dated: November 13, 1958.

[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 16215. United States Court of Appeals for the Ninth Circuit. Leslie M. Siberell, on Behalf of Himself and His Co-defendants, Oliver D. Siberell, James P. Siberell, Martha E. Jones, Daisy M. Bishop and Mabel Robson, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: October 3, 1958.

Docketed: October 9, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

No. 16,215.

LESLIE M. SIBERELL, on Behalf of Himself and His Co-defendants, OLIVER D. SIBERELL, JAMES P. SIBERELL, MARTHA E. JONES, DAISY M. BISHOP, and MABEL ROBSON,
Appellants

vs.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION.

APPELLANTS' OPENING BRIEF.

J. B. TIETZ,
Los Angeles 12, California,
Attorney for Appellants.

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

INDEX

Table of Cases

Statutes Cited

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT.

No. 16,215.

LESLIE M. SIBERELL, on Behalf of Himself and His Co-defendants, OLIVER D. SIBERELL, JAMES P. SIBERELL, MARTHA E. JONES, DAISY M. BISHOP, and MABEL ROBSON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION.

APPELLANTS' OPENING BRIEF.

This is an appeal from a judgment of the United States District Court for the Southern District of California, Central Division, denying the motion of defendants Siberell et al., to vacate a default judgment against them (R. 35-36).

This Court has jurisdiction of this appeal, under Title 28, U.S.C., Section 1291.

STATEMENT OF CASE.

Appellant Leslie M. Siberell filed a Motion to Vacate Judgment Against Certain Defendants Not Notified of Action (R. 24). By supporting affidavit he showed that neither he nor any of the moving parties interested in Parcel 481 had ever been served or notified of the condemnation action; that immediately upon learning of its pendency from an unrelated defendant (Ray L. Steven, see R. 27) he made persistent effort to learn if the property, of which he was an heir, had litigable value; that he employed mining geologists and an assayer and made two trips to said Parcel 481 (R. 28); even before he learned that its value was probably vastly in excess of the $100.00 awarded to the estate of the mother Minnie Siberell, he conferred with the United States Attorney in an effort to have the matter reopened (R. 27, par. 8). Failing in this, he promptly employed counsel and filed a Motion to Vacate on behalf of all the heirs (R. 27, par. 9). Said Motion was denied (R. 35).

THE FACTS.

The following abstract of the facts, unless otherwise designated, are all set forth in an affidavit of Leslie M. Siberell (R. 26-28).

Appellants are all the heirs of Minnie V. Siberell, who was deeded Parcel 481 (Birds Eye Porphyry mining claims).

A condemnation suit was commenced by Appellee involving 529,533 acres including said Parcel 481 (R. 3-).

Service by publication was made in a San Bernardino newspaper (R. 5-). Copy of Findings of Fact, Conclusions of Law and Judgment and Decree Fixing Compensation was mailed to Appellant on October 22, 1957 (R. 7-). Said Findings show that these appellants were not at the hearing on July 22 or 23, 1957 (R. 10).

Appellants, that is one of them, Leslie M. Siberell, learned of the proceedings involving property of their mother's estate by a telephone call from Raymond L. Steven to Leslie (R. 27). Said Steven subsequently, to show the facts and to aid the Siberells, disclaimed all interest in the property (R. 19).

Upon learning of the condemnation proceedings, appellant Leslie M. Siberell endeavored to view the property and have it appraised by his own appraiser, but encountered Navy obstinacy for several months: He asked the United States Attorney for the location of the parcel (R. 20), and asked for Navy permission to view it, but this was refused in September, 1957 (R. 20-21).

Finally, on October 24, 1957, the United States Attorney interceded on his behalf, and, again on December 12, 1957, wrote the Navy a peremptory letter (R. 22-23).

Thereafter, on February 1, 1958, he procured a Recreation Pass from the Navy and made two trips to Parcel 481 with mining geologists (R. 28).

His mining experts reported to him that the property was commercially valuable and estimated that the value of the ore, on location, was $100,000.00 (R. 31).

Thereupon, Appellant Siberell filed his Motion to Vacate, as aforesaid.

QUESTIONS PRESENTED AND HOW RAISED.

I.

The first question present is whether a defendant may be relieved from a default judgment. It was raised by the motion.

II.

The next question is whether the showing for relief was timely and sufficient. The motion also raised this issue.

SPECIFICATION OF ERRORS.

I.

The Court erred in denying appellants an order partially setting aside the judgment.

II.

The Court erred in refusing to permit appellants permission to answer and defend with respect to Parcel 481.

SUMMARY OF ARGUMENT.

Upon a proper showing, the rules permit relief to a defendant from a default judgment. After a showing like appellants' it is an abuse of discretion to deny relief.

A showing of excusable neglect, coupled with gross injustice if made within one year after entry of judgment, presents a showing requiring relief.

It is submitted that the following facts, presented by affidavit and the record, constituted such a showing:

1. These appellants were never personally notified of the proceedings. Service was made by publication, and in a paper in a county other than where they reside.

2. Upon learning of the proceedings from a friend, they acted promptly to ascertain the facts and the litigable value of their claim.

3. They then promptly asked the court for relief.

4. Finally, there is a gross and inequitable discrepancy between the $100.00 awarded by the court and the $100,000.00 valuation of appellants' experts, and justice requires that appellants have an opportunity to have the value of their inheritance determined.

ARGUMENT.

I.

A Defendant May Be Relieved from a Default Judgment.

It would seem that there should be no doubt on this proposition; that Rule 60 (b) (1) and (6) of the F.R.C.P. is controlling.

The rule, in part, reads:

"(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On Motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judg-

ment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken."

Since there probably will not be any disagreement on this point it will not be belabored.

The remaining question, then, involves whether appellants met this standard, and whether it was an abuse of discretion to deny relief.

II.

An Adequate Showing for Relief Was Made under Rule 60, and It Was an Abuse of Discretion to Deny Relief.

Rule 60 should be liberally construed, so that a motion presenting questions of substantial rights should be resolved in favor of setting aside a judgment, where parties have not been afforded opportunity to have their case decided on merits. This was the holding in *Re Cremidas' Es-*

tate, D. C. Alaska 1953, 14 F. R. D. 15. Also see *Barber* v. *Turberville,* D. C., 1954, 218 F. 2d 34.

The facts are not really in dispute. There was no personal service on appellants or their privies; the service by publication was in a newspaper different from the county of their residence; they acted promptly upon receiving knowledge of the action, and their motion for relief was well within the year mentioned in the rule.

They also acted diligently. They at once made every possible effort to determine if there was anything in the case to justify employing a lawyer. They proceeded against and overcame obstacles of military red tape. Upon finally receiving permission to inspect the property they employed experts and made two trips to the property. Upon learning that there probably was value in the property and vastly in excess of the nominal sum awarded, they promptly asked the court for relief.

It has been held by the Third Circuit that it was an abuse of discretion to refuse to vacate a default judgment, under the following circumstances: the allegations of appellant showed that he had never been properly served or notified in the action, and that he had a defense meriting consideration, and one that, if found true, required judgment in his favor. *Tozer* v. *Krause, etc.*, 189 F. 2d 242, 3 Cir., 1951. In its Tozer opinion, the court commented favorably on the Pennsylvania law that the general rule is that the rule on "the opening of default judgment is one of utmost liberality." (245). This is also the holding of *Barber* v. *Turberville, supra.*

There is not much authority to be found construing Rule 60. The standard for reversal, however, is clearly that appellant must show abuse of discretion on the part of the trial judge. The allegations in the Motion and supporting affidavits can be weighed differently, by different minds but appellants urge that the facts alleged definitely show an injustice would be worked by maintaining the $100.00 default award. Here, where the discrepancy between the $100.00 award and the probable value of the land is so great, the usual intendment in favor of the trial court's decision should be relaxed. It is submitted that it would work an obvious and harsh injustice to not relax the rule and to not give the appellants the opportunity of presenting their evidence.

Finally, in anticipation of appellee's argument, and to perhaps obviate the necessity of a closing brief, it is urged that appellants are not using Rule 60 as a substitute for the appellate procedure provided by law. Appellants had nothing to appeal from when they were served with a copy of the judgment in October, 1957. They had made no record of value in the proceedings, for they had had no opportunity to do so. They didn't even know if there was anything in the case worth fighting over. Thus, their situation is distinguishable from that in the nearest Ninth Circuit opinion our research has found, this court's decision in *Perrin* v. *Aluminum Co., etc.,* 1952, 197 F. 2d 254. In Perrin, the appellants had their appeal dismissed for want of jurisdiction and they tried to start over again in the trial court by a Motion to Vacate Judgment. This Court summed up their situation: "Having in consequence of their own

lack of diligence been turned away at the front door, they now seek entry at the rear." (255). That is not true here. Appellants had no substantial chance to present their evidence. That is all they ask.

CONCLUSION.

The case should be remanded with instructions to give appellants an opportunity to present their evidence on value.

Respectfully submitted,

---,

J. B. TIETZ,
Attorney for Appellants.

No. 16215

In the United States Court of Appeals for the Ninth Circuit

LESLIE M. SIBERELL, ON BEHALF OF HIMSELF AND HIS CO-DEFENDANTS, OLIVER D. SIBERELL, JAMES P. SIBERELL, MARTHA E. JONES, DAISY M. BISHOP, AND MABEL ROBSON, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Southern District of California, Central Division

BRIEF FOR THE UNITED STATES, APPELLEE

PERRY W. MORTON,
Assistant Attorney General.

LAUGHLIN E. WATERS,
United States Attorney,
Los Angeles, California.

HERBERT M. WEISER,
Assistant United States Attorney,
Los Angeles, California.

S. BILLINGSLEY HILL,
WALTER B. ASH,
Attorneys, Department of Justice,
Washington, D. C.

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No. 16215

LESLIE M. SIBERELL, ON BEHALF OF HIMSELF AND HIS CO-DEFENDANTS, OLIVER D. SIBERELL, JAMES P. SIBERELL, MARTHA E. JONES, DAISY M. BISHOP, AND MABEL ROBSON, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Southern District of California, Central Division

---

BRIEF FOR THE UNITED STATES, APPELLEE

OPINION BELOW

The district court did not write an opinion. The order denying the motion to vacate judgment appears in the Record at page 35.

JURISDICTION

This is an appeal from an order filed June 4, 1958 (R. 35), denying a motion to vacate a portion of a judgment entered November 1, 1957 (R. 40), awarding just compensation for property condemned by

the United States. Notice of appeal from the order of June 4, 1958, was filed July 28, 1958 (R. 36). The jurisdiction of the district court presumably was invoked under Rule 60(b) of the Federal Rules of Civil Procedure.[1] The jurisdiction of this Court rests on 28 U.S.C. sec. 1291.

QUESTION PRESENTED

Whether the trial court in June 1958 correctly denied appellants' motion to vacate a judgment entered in a condemnation proceeding on November 1, 1957, when appellants had adequate notice of the proceeding by publication in conformity with the provisions of Rule 71A, F.R.Civ.P., as well as personal notice in July 1957.

FEDERAL RULES INVOLVED

Rule 60 of the Federal Rules of Civil Procedure provides in pertinent part:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud

---

[1] Jurisdiction of the condemnation action was originally invoked by the United States under the Act of March 27, 1942, 56 Stat. 176, and the Act of June 26, 1943, 57 Stat. 197.

(whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

Rule 71A of the Federal Rules of Civil Procedure provides in pertinent part:

(d) Process.

* * * *

(3) Service of Notice.

* * * *

(ii) Service by Publication. Upon the filing of a certificate of the plaintiff's attorney stating that he believes a defendant cannot be personally served, because after diligent inquiry within the state in which the complaint is filed his place of residence cannot be ascertained by the plaintiff or, if ascertained, that it is beyond the territorial limits of personal service as provided in this rule, service of the notice shall be made on this defendant by publication in a newspaper published in the county where the property is located, or if there is no such newspaper, then

in a newspaper having a general circulation where the property is located, once a week for not less than three successive weeks. Prior to the last publication, a copy of the notice shall also be mailed to a defendant who cannot be personally served as provided in this rule but whose place of residence is then known. Unknown owners may be served by publication in like manner by a notice addressed to "Unknown Owners."

Service by publication is complete upon the date of the last publication. Proof of publication and mailing shall be made by certificate of the plaintiff's attorney, to which shall be attached a printed copy of the published notice with the name and dates of the newspaper marked thereon.

STATEMENT

The undisputed facts of this case, as shown by the Record, may be summarized as follows: This appeal involves one tract of land, designated Parcel 481, located in San Bernadino County, California, which was among many tracts taken by the United States in a lawfully-instituted condemnation proceeding to acquire land for the establishment of a Naval Ordnance Test Station at Inyokern, California. The records in San Bernadino County disclosed that one of the owners of a mining claim on Parcel 481 was Minnie V. Siberell (denoted as both "Siberell" and "Liberell" in those records). On April 19, 1956, pursuant to Rule 71A, F.R.Civ.P., *supra*, the United

States filed a certificate for service by publication, listing Minnie V. Siberell (denoted "Liberell" in the certificate) as one of the defendants who could not be personally served in this action because, after diligent inquiry within the State of California, her place of residence could not be ascertained (R. 4). Accordingly, on May 22, 1956, the United States filed a certificate of publication stating that it had caused publication once a week for three consecutive weeks in the San Bernardino Evening Telegram and The Evening Index of the notice of filing of the complaint and amended complaints in this condemnation action (R. 4). Listed in these publication notices as one of the persons having an interest in the mining claim known as the Bird's Eye Porphyry Lode (Parcel 481) was Minnie V. Siberell (again denoted "Liberell").

At the hearing to determine just compensation held on July 22 and 23, 1957, the United States presented competent evidence as to the value of Parcel 481. No person claiming an interest in this parcel entered an appearance. Appellant Leslie M. Siberell, one of the heirs of Minnie V. Siberell, admittedly received personal notice by telephone of this proceeding on July 22, 1957 (R. 27). Correspondence between the appellant and the United States Attorney concerning this condemnation action ensued during August and September 1957 (R. 18-20). On October 22, 1957, the findings of fact, conclusions of law, judgment and decree in this condemnation action were lodged with the court (R. 9-14), and copies thereof were mailed to appellant Siberell on the same

date (R. 7-8). Judgment was entered November 1, 1957 (R. 40).

A motion to vacate the judgment was filed May 8, 1958,[2] wherein appellant Siberell alleged that he had never been personally notified of the condemnation action, and requested that the judgment be vacated so that he could show that the amount awarded for Parcel 481 was inadequate (R. 24). This motion was supported by affidavits (R. 26, 31). The Government contended that it had complied with the notice requirements of the Federal Rules of Civil Procedure applicable to unknown parties in condemnation actions and that, in any event, appellant Siberell had actual notice of the proceedings months before judgment was entered and therefore was not entitled to vacate the proceedings (R. 28). After a hearing on May 26, 1958, where he heard oral argument and considered all the files and records in this case, Judge William M. Byrne denied the motion to vacate judgment by an order filed June 4, 1958 (R. 35). This appeal followed (R. 36).

ARGUMENT

I

The Trial Court Did Not Abuse Its Discretion in Denying Relief Under Rule 60(b) of the Federal Rules of Civil Procedure

A. *A motion to vacate judgment under Rule 60 (b) is addressed to the sound discretion of the trial*

[2] An earlier motion to vacate the judgment on the same grounds had been filed on March 25, 1958, and denied by the court without prejudice on April 7, 1958 (R. 41).

court and no abuse of discretion is shown:—Appellants correctly state that under Rule 60(b), F.R. Civ.P., a motion for relief because of excusable neglect may be made within one year after entry of judgment, but the vital issue in this case is whether the district court erred in denying the appellants' motion. It is well settled that a motion to vacate a judgment is "addressed to the sound legal discretion of the trial court, and its determination will not be disturbed except for an abuse of discretion." *Independence Lead Mines Co.* v. *Kingsbury*, 175 F. 2d 983, 988 (C.A. 9, 1949), cert. den. 338 U.S. 900; *Atchison, Topeka and Santa Fe Railway Co.* v. *Barrett*, 246 F. 2d 846 (C.A. 9, 1957); *Cole* v. *Fairview Development*, 226 F. 2d 175 (C.A. 9, 1955), cert. den. 350 U.S. 995; *Stafford* v. *Russell*, 220 F. 2d 853 (C.A. 9, 1955); *Perrin* v. *Aluminum Co. of America*, 197 F. 2d 254 (C.A. 9, 1952); *Union Bleachery* v. *United States*, 176 F. 2d 517 (C.A. 4, 1949). In a case only recently decided, this Court stated that "[t]he rule that a motion made under Rule 60(b) F.R.C.P. is addressed to the sound discretion of the trial court is well established." *Kolstad* v. *United States*, No. 15871, decided January 7, 1959, rehearing denied February 3, 1959.

Appellants have not and cannot show an abuse of discretion in this case. The situation was this: The Government, checking the records in the county where the land to be taken was situated, located several names of persons having or claiming an interest in the Bird's Eye Porphyry Lode. After due inquiry had failed to divulge the place of residence of Minnie

V. Siberell, the United States proceeded to give the publication notice provided by Rule 71A(d)(3)(ii), F.R.Civ.P. There was full compliance with the notice requirements of that rule, including the filing of a certificate for service by publication (R. 4), a certificate of publication (R. 4), and an affidavit of publication (R. 5). It cannot now be argued that such procedure does not constitute adequate notice,[3] for the Federal rules applicable to condemnation proceedings instituted by the United States specifically provide that where a person's residence is unknown and cannot be ascertained by the condemnor, service by publication is the appropriate procedure. See Rule 71A(d)(3)(ii), *supra* p. 3. That constructive notice in such situations fully comports with the due process requirements of the Fifth and Fourteenth Amendments was authoritatively established before the formulation of Rule 71A. Thus, in *Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306 (1950), the Supreme Court stated (pp. 317-318):

> This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning. Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situ-

[3] In fact, appellants did not below and do not on appeal challenge the constitutionality of publication notice in condemnation proceedings generally or as applied in this case. As shown *infra*, an argument to that effect would be to no avail.

> ation permits and creates no constitutional bar to a final decree foreclosing their rights. *Cunnius* v. *Reading School District*, 198 U.S. 458; *Blinn* v. *Nelson*, 222 U.S. 1; and see *Jacob* v. *Roberts*, 223 U.S. 261.
>
> Those beneficiaries represented by appellant whose interests or whereabouts could not with due diligence be ascertained come clearly within this category. As to them the statutory notice is sufficient. * * *
>
> * * * *
>
> Accordingly we overrule appellant's constitutional objections to published notice insofar as they are urged on behalf of any beneficiaries whose interests or addresses are unknown to the trustee.

Notice by publication is even more appropriate to condemnation proceedings which are *in rem.* Indeed, such a procedure is not only valid but essential. Thus, in Nichols, Eminent Domain, 3rd Ed., Vol. I, Sec. 4.103[2], p. 337, it is stated:

> A much needed public improvement ought not to be delayed because the owner of one of the lots to be taken lives at a great distance or is wholly unknown. It would not be right that condemnation proceedings, fully consummated, be set aside and public works, already constructed, be torn down because a missing heir, whose existence could not be known at the time of the taking, suddenly appears and demands that the property of which he claims to have been unconstitutionally deprived be restored to him. Even in private matters constructive notice is often held effectual against persons who cannot readily be reached. The furtherance of

> public objects cannot be made more onerous by the absence of the owners of land, and a non-resident owner can reasonably be expected to keep an agent near the property, to read the local newspapers, and to visit the land itself to see if any notices have been posted upon it. It is accordingly, generally, held that a non-resident owner need not be notified personally; some reasonable form of constructive notice satisfies the constitution.

That statement is supported by *Huling* v. *Kaw Valley Railway Co.*, 130 U.S. 559, 564 (1889), and *Walker* v. *City of Hutchinson*, 352 U.S. 112, 115-116 (1956). Cf. *Mitchell* v. *Reichelderfer*, 57 F. 2d 416 (C.A.D.C., 1932); *United States* v. *Norman Lumber Company*, 127 F. Supp. 518 (M.D.N.C. 1955), affirmed 223 F. 2d 868, cert. den. 350 U.S. 902. Moreover, actual knowledge of the proceedings by a claimant should defeat any objection based on lack of personal service or notice by publication. Cf. *Phillips* v. *United States*, 151 F. 2d 645 (C.A. 7, 1945). Since appellants admitted in their pleadings that they obtained personal knowledge of the condemnation action over three months before judgment was entered (R. 27), the trial judge could hardly be expected to have been impressed by appellants' emphasis on lack of personal notice as an important factor in determining the merit of their motion to vacate his judgment.

Furthermore, appellants' attack on the fairness of the condemnation award is without merit. The discrepancy between the amount awarded and appellants' alleged valuation of the property is based on

an unrealistic and erroneous theory of valuation. It is now well established that the measure of recovery in a condemnation action is the fair market value of the property. *Olson* v. *United States*, 292 U.S. 246, 255 (1934); *United States* v. *Petty Motor Co.*, 327 U.S. 372, 377 (1946); *United States* v. *Toronto Nav. Co.*, 338 U.S. 396, 402 (1949). Even assuming that the appellants' appraiser who prepared the affidavit could qualify as an expert witness, it is obvious that an opinion as to the assay value of an indeterminate quantity of ore, arrived at by multiplying the estimated quantity of ore by its per ton value at the surface, is patently erroneous as a measure of the fair market value of Parcel 481. *United States* v. *Meyer*, 113 F. 2d 387 (C.A. 7, 1940), cert. den. 311 U.S. 706; *United States* v. *Land in Dry Bed of Rosamond Lake, Cal.*, 143 F. Supp. 314 (S.D. Cal., 1956); *United States* v. *13.40 Acres of Land*, 56 F. Supp. 535 (N.D. Cal., 1944); *United States* v. *Indian Creek Marble Co.*, 40 F. Supp. 811 (E.D. Tenn., 1941). In that connection this Court has stated: "While the remedial statute [Rule 60(b)] is to be liberally construed, there still exists a definite burden on the moving party to prove the existence of the fraud, or other misconduct, or other cause for relief." *Atchison, Topeka and Santa Fe Railway Co.* v. *Barrett*, 246 F.2d 846, 849 (1957). And where the so-called newly discovered evidence, if received, would not have changed the result, there is nothing to indicate an abuse of discretion under Rule 60(b). *Union Bleachery* v. *United States*, 176 F.2d 517 (C.A. 4, 1949).

In short, since appellants had adequate notice of the condemnation proceeding and since their attack on the compensation awarded is based on an erroneous theory of valuation, there is nothing to indicate an abuse of the district court's discretion in this case. Cf. *Cole* v. *Fairview Development*, 226 F.2d 175 (C.A. 9, 1955). On the contrary, the trial judge's refusal to vacate his prior judgment and reopen the case under such circumstances constituted an eminently sound decision.

B. *Rule 60(b) was not designed as an alternative to a motion for new trial or review by appeal*:— There is in this case an additional consideration why appellants cannot succeed in their attempt to vacate the judgment. By his own admission, appellant Leslie M. Siberell received personal notice of this condemnation action by telephone on July 22, 1957, the date of the hearing to determine just compensation for the property taken (R. 27). During August and September he corresponded with the United States Attorney (R. 18-20). Shortly after October 22, he received copies of the findings of fact, conclusions of law, judgment and decree in the condemnation action (R. 27). Judgment was entered November 1, 1957 (R. 40), but appellants gave no indication to the court that its final judgment was contested until five months later when they filed their first motion to vacate. Between July 22, 1957, when Leslie M. Siberell obtained personal notification of the proceedings and late in March 1958, appellants did not file a motion to postpone judgment, a motion for retrial, or a notice of appeal within the applicable time limits.

In such circumstances an appellant "cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong * * *. There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from." *Ackerman* v. *United States*, 340 U.S. 193, 198 (1950). Moreover, the provisions of Rule 60(b) "were not intended to benefit the unsuccessful litigant who long after the time during which an appeal from a final judgment could have been perfected first seeks to express his dissatisfaction." *Morse-Starret Products Co.* v. *Steccone*, 205 F.2d 244, 249 (C.A. 9, 1953). "Certainly Rule 60(b) was not designed to afford machinery whereby an aggrieved party may circumvent the policy evidenced by the rule limiting the time for appeal." *Perrin* v. *Aluminum Co. of America*, 197 F.2d 254, 255 (C.A. 9, 1952).

Appellants attempt to evade these controlling cases by asserting that they do not fit their situation (Br. 8-9). We submit that since the judgment in question was entered in an *in rem* condemnation proceeding of which appellants had adequate notice, the effect of their failure to appeal within the required time limitation must be no different from any of the cases above cited. Any other result would mean that publication notice to unknown defendants in *in rem* proceedings does not constitute adequate notice, and that judgments against the property under such circumstances may be vacated at the will of the former landowner—even though he knew of the proceedings months before the judgment was entered. Such a

novel principle cannot be seriously entertained. Final judgments were intended to be, not tentative things, but decrees having finality. *Bullen* v. *DeBretteville*, 239 F.2d 824, 829 (C.A. 9, 1956); *United States* v. *Kunz*, 163 F.2d 344 (C.A. 2, 1947); *Lehman Co.* v. *Appleton Toy & Furniture Co.*, 148 F.2d 988 (C.A. 7, 1945).

While it is true that the opinion of Mr. Justice Black in *Klapprott* v. *United States*, 335 U.S. 601, 614-615 (1949), stated that subsection (6) of Rule 60(b) empowered courts "to vacate judgments whenever such action is appropriate to accomplish justice", this statement must be construed in the light of the factual situation to which it was addressed. Klapprott was seeking relief from a default judgment depriving him of his citizenship. Judgment had been entered without supporting evidence. Klapprott was without counsel and had no opportunity to obtain counsel, and the lower court had found that he was deprived of any reasonable opportunity to defend the action. The cases cited in the appellants' brief in which judgments were actually vacated involved similarly unique situations: In *In Re Cremidas' Estate*, 14 F.R.D. 15 (D. Alaska, 1953), the petitioner's attorney, who was representing the rights of an infant in a probate proceeding, was in such a state of drunkenness throughout the hearing as to be incapable of presenting the case on its merits and available witnesses were not called to testify on behalf of the minor child. The court took judicial notice of the fact that there were no other attorneys available in the vicinity of Nome during the period

in question, and petitioner was without funds to obtain counsel from another area. *Barber* v. *Turberville*, 218 F.2d 34 (C.A.D.C., 1954), involved a default judgment for $10,000.00 caused by the negligence of plaintiff's lawyer, and *Tozer* v. *Charles A, Krause Milling Co.*, 189 F.2d 242 (C.A. 3, 1951), presented a situation where the appellant had never been properly notified of the contract action instituted against it, where appellant had a complete defense to the actions, and the court felt that matters involving large sums of money should not be determined by default judgments if it could be reasonably avoided. Such cases constitute actions *in personam*, not *in rem*, and therefore, unlike this case, lack of personal notice becomes an important consideration in determining the merit of the motion to vacate judgment. Cf. *United States* v. *Norman Lumber Company*, 127 F.Supp. 518, 519-520 (M.D.N.C., 1955), affirmed 223 F.2d 868, cert. den. 350 U.S. 902.

A grant of judicial discretion under Rule 60(b) to deal with exceptional cases presenting compelling considerations of justice and equity cannot possibly be so extended as to open the doors generally to allow relief from a judgment whenever a litigant, by hindsight, concludes that his decision not to appeal the judgment was ill-advised. See *Ackerman* v. *United States*, 340 U.S. 193 (1950). It must be remembered that "while the Rule [60(b)] should be construed liberally in the interest of securing substantial justice between litigants, nevertheless it is desirable that a final judgment be not lightly disturbed * * *. If

judgments are vacated on tenuous and insignificant grounds they will lack finality, and there will be no end to litigation." *Cox* v. *Trans World Airlines, Inc.*, 20 F.R.D. 298, 300 (W.D. Mo., 1957). We submit that litigation would indeed be interminable if an application under Rule 60(b) could be granted on such a showing as appellants made below. Their motion is nothing more than a plea to be relieved of a voluntary and deliberate decision neither to move for a new trial between July 22 and November 11, 1957, nor to file a notice of appeal within sixty days after entry of the final judgment. For this reason alone, the district court was correct in denying the appellants' motion to vacate.

CONCLUSION

For the foregoing reasons, we submit that the district court did not abuse its discretion in refusing to vacate its judgment of November 1, 1957, and therefore that its order denying appellants' motion to vacate the 1957 judgment must be affirmed.

Respectfully,

PERRY W. MORTON,
Assistant Attorney General.

LAUGHLIN E. WATERS,
United States Attorney,
Los Angeles, California.

HERBERT M. WEISER,
Assistant United States Attorney,
Los Angeles, California.

S. BILLINGSLEY HILL,
WALTER B. ASH,
Attorneys, Department of Justice,
Washington, D. C.

MARCH 1959

☆ U. S. GOVERNMENT PRINTING OFFICE: 1959 500104 1192

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT.

LESLIE M. SIBERELL *et al.*, *Appellants*, vs. UNITED STATES OF AMERICA, *Appellee.*	**No. 16,215.**

PETITION FOR REHEARING.

J. B. TIETZ,
257 S. Spring Street,
Los Angeles 12, California,
Attorney for Appellants.

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3080

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT.

LESLIE M. SIBERELL *et al.*, *Appellants*, vs. UNITED STATES OF AMERICA, *Appellee.*	No. 16,215.

PETITION FOR REHEARING.

Come now the appellants, by their attorney, and file this their Petition for Rehearing of the Judgment entered by the Court on June 9, 1959, affirming the judgment of the court below.

Appellants reserve their argued position as to each of the points of appeal, but in this petition address themselves solely to a feature of the decision wherein they believe the court may be convinced its result is incorrect.

The decision should be reconsidered and for the following reasons:

The *per curiam* slip opinion concludes:

> "We are unable to say that the district court abused its discretion in denying appellant's motion."

Petitioners respectfully urge that this Honorable Court has overlooked what appellee's brief itself concedes (although counsel who orally argued the appeal in the

government would not go so far) that the government was negligently at fault in the condemnation proceedings, as will be related herein.

In brief, by way of background: appellants, by their motion, had urged the district court to permit them to show that the value of the condemned mineral land was much closer to $100,000.00 than to the $100.00 awarded by default; that none of them had ever been served in the proceedings; that the affidavit for service by publication was false in that no diligent search could have been made without a discovery of the heirs of Minnie V. Siberell, the owner of the condemned 60 acre parcel, known in these proceedings as Parcel 481.

Appellee's Brief on page four concedes this fatal flaw in the government's condemnation proceeding.

The law on service by publication is clear. Rule 71A (d) (3) (ii) authorizes such service after the filing of a certificate by plaintiff's attorney "stating that he believes a defendant cannot be personally served, *because after diligent inquiry within the state* in which the complaint is filed etc." (Emphasis supplied).

It is conceded by the government's brief writer (on said page four) that "the records in San Bernardino County disclosed that one of the owners of a mining claim on Parcel 481 was Minnie V. Siberell (denoted as *both* "Siberell" and "Liberell" in these records) (Emphasis supplied).

There it is. There was no excuse for overlooking that Siberell was the name. Siberell is a name concededly also

to be found in the Los Angeles County records and from the records of both counties it would have been simple (Los Angeles telephone directory) for any competent investigator to have located the Siberells interested in the proceedings.

Accordingly, the only conclusion is that justice in the trial court was as blind as in the investigation of defendants' addresses.

It is not sound legal discretion to deny an unserved defendant an opportunity to have his day in court when it is indisputable that plaintiff is at fault.

Wherefore, upon the foregoing grounds, and for other reasons appearing in Appellants' brief, it is respectfully urged that a rehearing be granted in this matter, and that the mandate of this Court be stayed pending the disposition of this petition.

Counsel further represents and certifies: In counsel's judgment this Petition is well founded and is not interposed for delay.

J. B. TIETZ,
Attorney for Appellants.

No. 16,216

IN THE

United States Court of Appeals

For the Ninth Circuit

LEE ANDREW WILLIAMS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court for the District of Alaska, Second Division.

BRIEF FOR APPELLEE.

RUSSELL R. HERMANN,
United States Attorney,
Second Division, District of Alaska,
Nome, Alaska,
Attorney for Appellee.

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SUMMARY OF ARGUMENT.

1. The court did not err in ordering causes Nos. 1631 (Obstructing Justice) and 1632 (Rape) consolidated for trial.

(a) They were properly consolidated under Rule 13, Federal Rules of Criminal Procedure as they were two transactions closely connected together.

(b) The charge of obstructing justice would have been admissible evidence to show guilty conduct on the part of the accused as to the rape charge.

(c) The rape charge would have been admissible evidence to show motive for obstructing justice.

2. Cause No. 1631 stated a cause of action for obstructing justice as a case was pending in the District Court for presentation to the grand jury which defendant corruptly attempted to have dismissed.

3. The statement made by the District Attorney that he believed the defendant was lying was not prejudicial.

(a) It was not inadmissible as an opinion as it was made in reference to the defendant's testimony on the witness stand.

(b) The remark was not severe enough to be objectionable per se.

(c) Two instructions were given by the court to the jury which eliminated any prejudicial effect.

4. The testimony of the witness Walter Sinn, a police officer, was admissible, not as corroboration of the victim, but to show that the victim was a witness and that defendant corruptly induced her to repudiate her statement.

No. 16,216

IN THE

United States Court of Appeals

For the Ninth Circuit

LEE ANDREW WILLIAMS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court for the District of Alaska, Second Division.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

Appellant in his brief at page two indicates that, Virginia Ahkinga, victim of the alleged rape "casually" mentioned to the police officer that she had intercourse with the defendant. It is conceded that the subject of rape came up during the investigation of another matter, but the discussion of rape was not a "casual" one. Although the statement which defendant was alleged to have had her falsely change later was first given at that time (Tr. Vol. 2 pp. 34 and 64), it was later put in writing at the same time the complaint was made (Tr. Vol. 2 pp. 64-65).

Appellant at page 3 of his brief alleges that appellant was not present when the alleged victim Virginia Ahkinga was interviewed at the schoolhouse by the Commissioner. Although defendant did not witness the interview itself he must have at least known she was interviewed as they saw each other at the schoolhouse on the date in question (Tr. Vol. 2 pp. 21, 22, 32, 40, 65, 111 and 112). Both defendant and Virginia were questioned at that time and defendant was advised that he was charged with statutory rape and thereupon waived preliminary examination and was held to answer to the grand jury.

This possible defense, that he did not know she was a witness, was never raised at the trial. At the time the witness gave her second statement repudiating the first statement, defendant had been advised by the commissioner that there had been a previous statement (Tr. pp. 113 and 114). Since the whole purpose of defendant's trip to Barrow was to get a statement from Virginia Ahkinga, he must have known she was a witness. It is this statement he is alleged to have procured falsely for the purpose of getting the charge dismissed and thus obstruct justice (Tr. Vol. 2 p. 126).

THE ARGUMENT.

I. THE COURT DID NOT ERR WHEN IT CONSOLIDATED THE TWO CASES FOR TRIAL AS THEY WERE TWO TRANSACTIONS WHICH WERE INSEPARABLY CONNECTED TOGETHER. THE TESTIMONY IN EITHER CASE WOULD HAVE BEEN ADMISSIBLE EVIDENCE AS TO MOTIVE, INTENT AND KNOWLEDGE NECESSARY TO ESTABLISH GUILT IN THE OTHER CASE.

Consolidation of two cases for trial together is governed by Rule 13 which also incorporates Rule 8(a) which reads as follows:

Federal Rules of Criminal Procedure, Rule 13

> The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.

Federal Rules of Criminal Procedure, Rule 8 (a)

> Joinder of offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

The courts in interpreting this rule have held generally that several charges may be consolidated where they were so connected in time, place, and occasion that it would be difficult to separate proofs of each. See *Beaux Arts Dresses v. United States,* C.C.A. N.Y.

1925, 9 F. 2d 531, *cert. denied* 46 S. Ct. 210, 270 U.S. 644.

Decisions have also held that the trial court has wide discretion in consolidating such indictments for trial. See *United States v. Rosenblum,* C.A. Ind. 1949, 176 F. 2d 321; and *United States v. Antionelli Fireworks Co.,* C.C.A. N.Y. 1946, 155 F. 2d 631, *cert. denied* 67 S. Ct. 49, where the court said at p. 635:

> The summary of the indictments and of the testimony already given amply demonstrates the near identity of the defendants, the similarity of the offenses charged, *and the necessarily overlapping nature of the evidence in support of each.* The facts of the case place it well within the terms of 18 U.S.C.A. Sec. 557 authorizing consolidation when "there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together". See *United States v. Smith,* 2 Cir., 112 F. 2d 83; *McNeil v. United States,* 66 App. D.C. 199, 85 F. 2d 698; Federal Rules of Criminal Procedure, Rules 8, 13, advisory committee notes thereto. (Italics mine.)

Since the trial courts are given discretion in determining whether two cases may be consolidated, the appellate courts will not reverse unless there is a clear abuse of discretion. See *Cataneo v. United States* C.C.A. Md. 1948, 167 F. 2d 820; *Stockley v. United States,* C.C.A. Cal., 1948, 166 F. 2d 704, *cert. denied* 68 S. Ct. 1502, 334 U.S. 850, 92 L. Ed. 1776. Several examples where cases involving similar or connected transactions as well as evidence of an overlapping

nature will be given below under a discussion as to the admissibility of one case as evidence of guilt in the other.

In *United States v. Perlstein, et al.* (120 F. 2d 276, C.C.A. N.J. 1941), the court held that it was not error to try together two counts in an indictment one of which was conspiracy to operate an unregistered still and the other conspiracy to obstruct justice by inducing witnesses not to identify the accused. Although in that case the two charges were of the same class as they were both conspiracies, the court did not allow the joinder for that reason alone, but said at page 280:

> However, even though the offenses charged are of the same class, the right to join them in one indictment is further restricted by the statute, which provides that the right exists only if they "may be properly joined". The propriety of such joinder must be determined under "the settled principles of criminal laws".

The court then determined the test to be used in determining whether separate charges met the usual objections to a joinder and said at page 281:

> It thus appears that action upon an alleged misjoinder of counts in an indictment is a matter of discretion with the court and that if in the opinion of the court the jury will not be confused by the multiplicity of charges and the defendant will not be embarrassed in his defense the court may refuse to direct an election by the government. It is, as this court pointed out in *United States v. Silverman,* 3 Cir., 106 F.2d 750, a choice

between the economy of a single trial of issues which are closely related, on the one hand, and the safeguarding of the defendant from the possibility of prejudice arising from the multiple charges, on the other hand.

In the instant case the two charges in separate indictments were tried together as they involved the same transaction rather than cases of the same character. That they were parts of the same transaction is made quite clear in the court's instruction No. 4, where the jury was advised that in order to find the defendant guilty of obstructing justice they must first find him guilty of the charge of rape (Tr. Vol. 1, p. 10). Since the first of the alleged false statements was a denial of any rape and since the existence of the rape was a matter within the personal knowledge of the defendant, whether or not he "corruptly" influenced the witness must of necessity depend on whether or not there was in fact a rape. The fact of a rape being committed was the ultimate issue in the charge of rape and was a necessary element of the charge of obstructing justice as he was charged with knowledge that the victim's denial of rape was a false statement. The rape itself was therefore a common denominator to both charges and would have to be proved in both cases in order to justify a conviction as to either charge.

Appellant claims that the jury may have been misled or confused by the joinder. This could only be true if the proof of one charge could in fact be kept out of a trial for the other. It is appellee's conten-

tion that they could not but that (1) evidence of the rape would be admissible as proof of the charge of obstructing justice to show intent, motive, and as mentioned above, guilty knowledge, (2) the fact of a corrupt obstruction of justice would be admissible during a trial for the charge of rape as a statement in the nature of an admission and subsequent guilty conduct. These two propositions will be taken up in the order given.

(1) Evidence of Rape Was of Probative Value in the Trial for Obstructing Justice.

As a general proposition proof of a motive to commit a crime is always relevant. See *Painter v. United States,* 151 U.S. 396, at 413 (1894). In that case it was held that it was not necessary to show a motive, but it was indicated that it is always a weakness of the case if no motive is shown.

Trial courts are given broad discretion to admit evidence of motive. See *Moore v. United States,* 150 U.S. 57, 61 (1893), although how much and what kind of evidence should come into a trial is a matter for carefully exercised judicial discretion, *United States v. Rosenberg,* 195 F. 2d 583, 595 (2nd Cir. 1952).

In another recent case, a murder trial, it was held that evidence that the accused had robbed a bank was admissible to show a motive to shoot his way out of a hotel in which he was entrapped. See *United States v. Puff,* 211 F. 2d 171, 175 (2nd Cir.), *cert. denied;* 74 S. Ct. 713 (1954).

Another recent case involved a charge of obstructing justice, the proof of knowledge of the execution of a mortgage was admitted to show that defendant could hope for financial gain by obtaining a wealthy client for whom he attempted to obstruct justice. See *Zamlock v. United States,* 193 F. 2d 889, 892 (9 Cir.), *cert. denied* 343 U.S. 934 (1952).

Motive, like intent, may be shown by proof of prior criminal conduct of a defendant even where he does not take the stand. See *United States v. Puff, supra; United States v. Schiller,* 187 F. 2d 572, 574 (2 Cir. 1951). The prior criminal conduct utilized to show motive does not necessarily have to involve similar offenses. See *Moore v. United States, supra,* at p. 61. In that case the two crimes were similar, but the decision was based on the fact that one crime was to prevent discovery of the other crimes, as the victim of the murder on trial was killed while investigating a prior murder. The court said:

> "The fact that the testimony also had a tendency to show that defendant had been guilty of Camp's murder would not be sufficient to exclude it were it otherwise competent."

A case similar to the one now on appeal is *Ladrey v. United States,* 155 F. 2d 417 (D.C. Cir., 1946). In that case the defendant was charged with attempt to bribe another not to testify as to an abortion he performed on her. The court admitted evidence as to the abortion previously performed on the witness defendant attempted to bribe.

> Sec. "(2)" . . . The appellants urge that it was improper and prejudicial for the court to permit Hazel Queenan to testify concerning the illegal operation she said Ladrey performed on her. They said that this was evidence of an offense for which they were not on trial. In the case before us, which is the bribery charge, it was proper to admit evidence of the attempt to bribe, and, as well, evidence tending to show that Hazel Queenan was a material witness in the abortion case. Her testimony concerning the operation was limited to statements to the effect that she was the person upon whom the operation had been performed, and statements showing the nature of the operation. This was no more than the bare necessity of the case for the prosecution required. Consequently it was not error to receive it.

From this holding it is quite apparent that as a matter of evidence proof of a prior or subsequent crime is admissible if it has probative value as to defendant's motive, intent, or knowledge regardless of whether the crimes are of a similar character. Here the government contends that the charge of obstructing justice is part of the same transaction as the rape and that the two crimes, as in the abortion case cited above, are so closely associated as not to be capable of being separated.

(2) Evidence of the Charge of Obstructing Justice Is Also Admissible as It Shows Probability of the Rape Having Been Committed.

The defendant Virginia Ahkinga stated that the statement induced by the defendant was a false statement and that he induced her to change her story so

he would not go to jail and so he could support her, and that he implied he would marry her (Tr. Vol. II pp. 20, 21, and 43). The defendant, if this were true, was thus attempting to suppress evidence of his guilt. It has been repeatedly held that efforts to suppress evidence are admissible as evidence of guilt. See *United States v. Gottfried,* 165 F. 2d 360, 363 (2d Cir. 1948) concerning the making of a false written statement to the O.P.A.:

> It is the universal rule that attempts to suppress evidence of a crime are competent evidence of guilt.

See, also *United States v. Freundlick,* 95 F. 2d 376 at 378-9 (2 Cir. 1938) where accused's attempt to influence the testimony of a witness was held admissible:

> If the proper interpretation of the interview was that Freundlick was trying to influence Peckman's testimony regardless of the truth, it is of course well settled that that was evidence of guilt.

See, also, *United States v. Katz,* 78 F. Supp. 435, 438 (M.D. Pa. 1948):

> Evidence of the misconduct of a party in connection with the trial of his case is admissible as tending to show that the party guilty of the misconduct is unwilling to rely on the truth of his cause.

SUMMARY. Above it has been shown that when deciding whether or not two crimes involving the same transaction may be tried at one trial the test is

whether or not the defendant would be prejudiced by such a joinder. It has been shown above that the defendant here would not be so prejudiced as evidence of either offense would have probative value and be admissible as evidence of guilt of the other offense. It is therefore submitted that the trial court did not abuse its discretion in ordering the cases consolidated for trial (Appellant's Spec. I and II).

II. THE ALLEGATIONS OF THE INDICTMENT OF CAUSE NO. 1631 CONSTITUTED A VALID CAUSE OF ACTION OF OBSTRUCTING JUSTICE.

Indictment No. 1631 (Tr. Vol. 1 p. 1) charges the defendant with corruptly influencing the witness Virginia Ahkinga to make a false statement for the purpose of having a charge, on which the defendant was held to answer, be dismissed. The territorial statute in question is Chapter 81, S.L.A. 1953, now Alaska Compiled Laws Annotated Cumulative Supplement 1957, Section 65-7-29 which reads as follows:

> Sec. 65-7-29. Influencing witnesses, judges or jurors: Obstructing administration of justice. Whoever corruptly, or by threats or force, or by any threatening letter of communication, endeavors to influence, intimidate, or impede any witness, in the District Court of the District of Alaska or before any United States Commissioner or other committing Magistrate, or any grand or petit juror, judge, or officer in or of the District Court of the District of Alaska, or officer who may be serving at any examination or other proceeding before any United States Commissioner

or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall, upon conviction, be fined not more than $5,000 or imprisoned not more than five years, or both. (L 1953, Ch 81, Sec 1, p 193, app Mar. 26, 1953.)

A glance at Section 65-7-29 will reveal that it is almost identical with Title 18 U.S.C.A. Section 1503 (62 Stat. 769). The reason for this is probably the decision in *United States v. Bell,* 14 Alaska Reports 142 (Decided Dec. 19, 1952). In that case it was held that 18 U.S.C.A. Section 1503 did not apply in a case involving Alaskan statutes as the District Court of Alaska was not a "court of the United States" within the meaning of Title 18 Section 1503. Since the decision came down in 1952 and the 1953 legislature passed the same act with a few minor changes necessary to adapt it to Alaskan needs it would seem log-

ical that they intended to make the statute applicable to Alaska as an Alaskan statute. Therefore the federal courts' construction of Sec. 1503 should apply in this case and a few of them will be cited below.

Appellant's specification No. III (App. B. p. 3) is argued at page 18 in his brief. He claims that no proceeding was pending at the time the false statement was made before the commissioner at Barrow. As was pointed out in appellee's "Statement of the Case" at page 1 above, the defendant had been held to answer for the crime of rape and had been released on appearance bond at the time the statement was taken.

In the present case the defendant was accused of obtaining the statement for the purpose of having a criminal charge dismissed (Tr. Vol. 2 pages 114, 126 and 127). The statement was to be forwarded by the commissioner to the authorities at Nome and used as a basis for a dismissal of the action (Tr. Vol. 2 p. 88). It is not necessary that court action is actively being taken at the time of the corrupt behavior, but it is enough if court action is even being contemplated and the witness need not be under a formal subpoena. See *Odom v. United States,* C.C.A. Tex. 1941, 116 F. 2d 996, reversed on other grounds 61 S. Ct. 957, 313 U.S. 544, 85 L. Ed. 1511; *Walker v. United States,* C.C.A. No. 1938, 93 F. 2d 792. It has also been held that endorsement of a person's name on a complaint made him a witness. See *United States v. Bittinger,* D.C. No. 1876, Fed. Case No. 14,598. In the present case the witness was the victim of the rape.

Appellant relies on *United States v. McLeod,* 119 F. 416 (erroneously cited as United States v. "M'-Cloud") for the proposition that when the commissioner has held the defendant to answer he has completed his duties and can not thereafter be intimidated to obstruct justice (Appellant's Brief p. 19). Appellant overlooks the motive of the defendant in committing the assault on the commissioner in the *McLeod* case. There the purpose of the assault was revenge and this is quite different from the motive in the present case which was to obtain a false statement which was to be used to obtain a dismissal in the District Court. It is quite true that in both cases the commissioner himself was not engaged in the "administration of justice", but in the present case the defendant intended to use the commissioner in his scheme to thwart justice in the District Court. Obtaining a false statement *for that purpose* is the offense and it would not matter where the statement was obtained as the crime is against the District Court where defendant was held to answer and had entered his appearance bond.

Obstruction of justice may occur at any stage of a court proceeding from the time the complaint is signed (See *United States v. Bittinger, supra*) up until the time the case has been concluded. It has even been held that justice can be obstructed after the verdict is in but before the defendant is sentenced. See *United States v. Polakoff,* C.C.A. N.Y., 1941, 121 F. 2d 333, *cert. denied* 62 S. Ct. 107, 314 U.S. 626, 86 L. Ed. 503, where an attempt was made to influence

an assistant district attorney to be lenient by false representation.

The case on appeal is quite similar to the *Polakoff* case *supra* in that both were an attempt to influence the district attorney. In the present case the attempt was to influence him to have the case dismissed, in the other it was an attempt to cause him to be lenient.

It has been held that sending a letter to a grand juror with intent to influence the action of grand jury is a violation to Title 18 U.S.C.A. Sec. 243 (now Title 18 U.S.C. Section 1503) which punishes anyone who attempts to influence the action upon "any matter pending before such juror" regardless of the intent of the person exerting the influence. See *Duke v. United States,* C.C.A. Va. 1937, 90 F. 2d 840, 112 A.L.R. 317, *cert. denied* 58 S. Ct. 33, 302 U.S. 685. The charge in the present case (Sec. 1503) is quite similar except it refers to a matter prior to its actual consideration by a grand jury. In the present case the witness was one who would necessarily testify before the next grand jury as the defendant had been held to answer to the grand jury and she was the alleged victim of the rape. The only major difference in the two cases is that the charge of obstructing justice requires a corrupt intent. Proof of corrupt intent was offered in that the statement was claimed to have been false. Under old Title 18 Sec. 241 (now Title 18 U.S.C.A. Sec. 1503) it has been held that the witness need not actually be before the grand jury but that acts in preparation for attendance before the grand jury are included. See *Bosselman v. United*

States, N.Y. 1917, 239 F. 82 at 84, 152 C.C.A. 132, where it was held that altering account books preparatory to presenting them to the grand jury was a violation of the code.

In the *Odom* case *supra* the court said at p. 998:

> One may be a witness within the protection of this statute even though he may not be under formal subpoena. If he knows or is supposed to know material facts, and is expected to testify as to them, or be called to testify, he is a witness; and he is such, of course, when he has already given testimony, though not subpoenaed.

In the *Odom* case the witness was interfered with after the case, but the decision indicates that it is immaterial whether the interference is before, during or after the case and limits the fact in question as to whether or not the person is really a witness to the facts at issue in the case regardless of the stage of the proceedings or regardless of whether or not a subpoena has been issued. The case also holds that if the person approached is a witness that very little proof is required that defendant had knowledge that the person was in fact a witness where the accused does know that there is a court proceeding pending concerning the matter involved (pp. 998-999).

III. THE EXPRESSION BY THE DISTRICT ATTORNEY THAT HE THOUGHT THE DEFENDANT WAS "LYING" WAS MADE WHILE COMMENTING ON THE TESTIMONY OF THE DEFENDANT WHO TOOK THE STAND AND WAS NOT A REMARK WHICH WOULD PREJUDICE THE JURY.

Appellant contends that the District Attorney called the defendant a "liar". What was actually said is in doubt (Tr. Vol. 2 p. 47) as the reporter did not catch the exact language of the remark due to an interruption. It was conceded at the hearing on the motion for judgment of acquittal that the District Attorney said that he believed the defendant was lying (Tr. Vol. 1 p. 47). This remark was objected to at the time and the court instructed the jury to disregard it. The court later, out of the presence of the jury, said the remark was not actually prejudicial and that it was in error to have sustained the objection at all (p. 47). The court thus made an incorrect ruling favorable to the defendant.

The court also in Instruction No. 13 said to the jury:

> The arguments of counsel based upon study and thought may be, and usually are, helpful; however it should be remembered that arguments of counsel are not evidence and can not rightfully be considered as such. It is your duty to give careful attention to the remarks of counsel, so far as the same are based on evidence which you have heard and the proper deductions therefrom. . . . (Tr. Vol. 2 p. 18.)

The remark was made directly in reference to the appearance of the defendant on the stand (Tr. Vol.

2 p. 47) and not a mere statement of the prosecutor's own opinion derived from matters not actually presented in court.

Appellant in the District Court (Tr. Vol. 1 pp. 36 and 48) relied on the case of *United States v. Hallinan* (9 Cir.), 182 F. 2d page 880, for the theory that the government attorney should not give his opinion; actually that decision was quite the opposite. See page 885.

> Of course, counsel may, and often does, in argument to the jury, after the evidence has been presented, give the jury the benefit of his opinion of the veracity of the witness and the character and weight of testimony presented.

What the court condemned in the *Hallinan* case was very vile remarks made about the witnesses in the opening statement before the witnesses had testified. Remarks made at the close of the evidence concerning the testimony of witnesses who actually testified may be the subject of comment and even opinion.

Judge Hodge, further in his opinion in the lower court cites a case where much stronger comments were used and it was held not to be an error (Tr. Col. 1 pp. 49, 50). Namely *Johnston v. United States,* 9 Cir. 1907, 154 F. 445, in which the defendant was referred to as a "hired ruffian" and "hired gunfighter". The court held the remark was justified by the evidence.

As long as the District Attorney made the comment relative to defendant's testimony on the stand it is quite proper for him to comment on the defendant's testimony and the trial judge was apparently quite

well satisfied that that was what the District Attorney was doing (Tr. Vol. 1 pp. 48-50). Appellant's specification of error No. VII therefore does not stand.

IV. THE TESTIMONY OF WALTER SINN WAS ADMISSIBLE TO ESTABLISH THE CHARGE OF OBSTRUCTING JUSTICE AND WAS ADMITTED FOR THAT PURPOSE AND NOT TO CORROBORATE THE TESTIMONY OF THE VICTIM; THE TESTIMONY OF THE VICTIM WAS CORROBORATED BY THREE INDEPENDENT WITNESSES.

Appellant alleges in his brief at page 12 that the testimony of Walter Sinn, a police officer, should not have been admitted as it did not relate to the *res gestae* of the rape charge. A long argument follows this statement which includes several cases which hold that statements made by a victim after the completion of the crime at issue are not admissible as part of the *res gestae* but are hearsay and therefore not competent testimony. Appellee agrees with this general statement as to the law, but claims it does not apply here as the statement of the victim to the police officer was not admitted to corroborate her claim that she was raped, but was admitted to show that (1) she was a material witness in the rape case, (2) that she had made a statement that defendant later corruptly induced her to change. The testimony of Walter Sinn was admitted in support of the charge of obstructing justice, not in regard to the charge of rape (*i.e.* Cr. No. 1631 not 1632).

The court was quite clear in this respect. Reviewing the testimony of Walter Sinn as a whole it is revealed that he never actually testified as to what the

victim Virginia Ahkinga told him at all. He did testify that he made his complaint on the basis of what she told him, but did not say what she told him (Tr. Vol. 2 pp. 67-68). He also said that he did take a statement in writing which she later signed (p. 68) but this statement was not introduced by the government at all, but by the defendant's attorney previously during the cross-examination of Virginia Ahkinga, the person who made the statement (Tr. Vol. 2 pp. 39-40). Regardless of who introduced the exhibit in evidence the statement was not issued to prove the truth or falsity of the victim's accusation of rape, but, as far as the government is concerned to show that a statement used as a basis for a complaint had been made and a complaint issued thereon, and, as far as the defense is concerned it appears the exhibit was introduced so that there would be a contrary exhibit in the record to impeach the witness. At any rate, since the truth or falsity of the statement was not the main issue and since it was introduced at the time the person making the statement was being cross-examined by the defense it was not hearsay. All that Officer Sinn did was corroborate that the statement was actually made, he neither read it nor produced it for evidence as it was already in evidence.

That the statement was received because of its bearing on the charge of obstructing justice (No. 1631) see Tr. Vol. 2 pp. 12, 13 and 14, where both the government and the court stated that the statement was to be used in relation to the charge of obstructing justice and not as a subsequent consistent statement of a

rape victim or as pertaining to the *res gestae* of the rape case. In his opinion on the motion for a judgment of acquittal, Judge Hodge held that the statement was perfectly admissible because of its bearing on the charge of obstructing justice even though it would not have been admissible as to the rape charge (Tr. Vol. 1 pp. 50-51). The judge held that cases cited by defendant's counsel were not applicable as the evidence was to be used to prove the charge of obstructing justice and not the charge of rape.

As pointed out above in argument "I" the charge of obstructing justice itself would be admissible to show guilty conduct as evidence of rape. It could hardly be prejudicial to show the various elements of the charge of obstructing justice.

Appellant's objection to the testimony of Officer Sinn was that it was used to corroborate the victim and that without it the testimony of the victim would have stood uncorroborated. As was pointed out above, all Officer Sinn testified to was that a statement had been made which led to the complaint. The statement itself was already introduced by defendant's counsel. However, not by any stretch of the imagination was the testimony uncorroborated. It was corroborated by the witness, Mary Suvlu (Tr. Vol. 2 pp. 47-57) who testified that on the night in question the defendant had rented a hotel room under an assumed name. This room was the same room the victim had described. Further corroboration was given by the witness Albert Hagberg (Tr. Vol. 2 pp. 73-78) who testified that he occupied a room next to

the one occupied by defendant and heard a woman's voice and noises coming from the bed at the time in question. It was further corroborated by the witness Harold Stull (Tr. Vol. 2 pp. 79-83) who testified that he was in the lobby of the hotel and saw the victim and the defendant come out of the hotel room a few moments apart. All of these witnesses corroborated the girl's testimony that defendant had taken her to a hotel room and had intercourse with her there. Appellant's contention that without the statement made by the victim to the police officer her accusation of rape would not be corroborated simply does not stand in view of this other independent testimony. Therefore specifications Nos. IV, V, and X do not stand nor do the specifications relating to the judges' refusal of the motions attacking the verdict or for judgment of acquittal at the close of the evidence.

CONCLUSION.

I. The trial court did not err in consolidating the two causes for trial as they were two transactions inseparably connected together and either cause could have been presented at a trial for the other cause as competent evidence of guilt as each had a proper bearing on the factors of motive, intent and guilty knowledge necessary in both cases.

II. The allegations of the Indictment of Cause No. 1631 relating to a charge obstructing justice constituted a valid cause of action, as, although the commissioner who took the false sworn statement did not at that time have jurisdiction of the case, the state-

ment was taken for the purpose of obtaining a dismissal of a case in which the defendant had been held to answer to the grand jury.

III. The remark of the District Attorney to the effect that the defendant was lying was perfectly proper as it was given with reference to the appearance of the defendant on the stand and it was not the type of remark that is prohibited as being of a degrading or inflammatory nature. As it was not an opinion on the ultimate issue of the case, it was not prohibited as an opinion.

IV. The testimony of the police officer, Walter Sinn, was not admitted as part of the *res gestae* of the rape case or as a subsequent consistent statement for corroborative purpose, but was admitted to show that the witness was a witness to the rape case and that the acts of defendant in causing her to change the statement were acts constituting a corrupt obstruction of justice.

The errors complained of by appellant do not exist and the court's decision on the several motions and matters was based on sound interpretation of law. The judgment should be affirmed.

Dated, Nome, Alaska,
January 20, 1959.

Respectfully submitted,

RUSSELL R. HERMANN,
United States Attorney,
Second Division, District of Alaska,
Attorney for Appellee.